No. 05-805

In The
Supreme Court of the United States

GERALD K. WASHINGTON, ACTING WARDEN,
Sussex I State Prison,

Petitioner,

v.

WILLIAM WILTON MORRISETTE, III,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Does defense counsel perform ineffectively under the Sixth Amendment if, at the time of trial, he failed to foresee changes to settled state law which the appellate court would make in the future?

2. May a court reviewing a claim of ineffective assistance of counsel presume prejudice from counsel's failure to foresee changes to settled state law which the appellate court would make in the future?

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STATEMENT OF JURISDICTION

The judgment upon which certiorari review is sought was entered on June 3, 2005, in a 4-3 split decision of the Supreme Court of Virginia granting a writ of habeas corpus and vacating the sentence of death on the grounds of ineffective assistance of counsel under the Sixth Amendment. *Morrisette v. Warden*, 613 S.E.2d 551 (Va. 2005). (App. 1). The Warden's timely petition for rehearing of that decision was denied by the Supreme Court of Virginia on September 23, 2005, in an unpublished order. (App. 32). Jurisdiction to review the petition for a writ of certiorari is conferred on this Court by 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. United States Constitution, Amendment Six:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an

> impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

2. United States Constitution, Amendment Fourteen, Section One:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Virginia Code § 19.2-264.4(D) (1950 Code, 2000 Interim Supplement to Vol. 4A) (Code version applicable during Morrisette's trial):

> (1) We, the jury on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.
>
> Signed _____, foreman

or

(2) We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

Signed _____, foreman"

(App. 54-55).

STATEMENT OF THE CASE

1. Proceedings

A jury convicted Morrisette in the Circuit Court for the City of Hampton, Virginia on August 15, 2001, of the capital murder of Dorothy White in the commission of rape. Virginia Code § 18.2-31(5). In a separate sentencing proceeding, the jury sentenced Morrisette to death, finding both the "future dangerousness" and "vileness" aggravating circumstances. The court entered the final sentencing order on October 30, 2001. The Supreme Court of Virginia unanimously affirmed Morrisette's conviction and sentence of death on September 13, 2002. *Morrisette v. Commonwealth*, 569 S.E.2d 47 (Va. 2002). (App. 52). On December 8, 2003, this Court denied Morrisette's petition for writ of certiorari. *Morrisette v. Virginia*, 540 U.S. 1170 (2003).

With the assistance of new court-appointed counsel, Morrisette filed his state habeas corpus petition in the Supreme Court of Virginia on March 5, 2004. On June 3, 2005, the state Supreme Court granted the writ of habeas corpus on Morrisette's claim that trial counsel was constitutionally ineffective in failing to object to the statutorily-required penalty phase verdict form used in Morrisette's 2001 capital murder trial. *Morrisette v. Warden*, 613 S.E.2d 551 (Va. 2005). (App. 25). Justice Kinser wrote a

dissenting opinion in which Justices Lemons and Agee joined. (App. 26-31).

2. Morrisette's Habeas Claim

Morrisette alleged a Sixth Amendment violation under *Strickland v. Washington*, 466 U.S. 668 (1984). He contended that his trial counsel unreasonably failed to challenge the penalty phase verdict form used in his case on the grounds that it allegedly failed to (1) require a life sentence if the jury did not find an aggravating factor and (2) allow a life sentence if the jury found an aggravating factor.[1] On his second point, Morrisette relied on *Powell v. Commonwealth*, 552 S.E.2d 344 (Va. 2001), an opinion issued two months before Morrisette's trial.

The Warden moved to dismiss Morrisette's claim, arguing that the verdict form used in Morrisette's case followed the form mandated by Virginia Code § 19.2-264.4(D) (App. 53), that it was an accurate and complete statement of the available sentencing options, and that it previously had been upheld by this Court, *see Weeks v. Angelone*, 528 U.S. 225, 235 (2000), and by the Supreme Court of Virginia on numerous occasions. *See Roach v. Commonwealth*, 468 S.E.2d 98, 105 (Va.), *cert. denied*, 519 U.S. 951 (1996); *Mueller v. Commonwealth*, 422 S.E.2d 380, 396-397 (Va. 1992), *cert. denied*, 507 U.S. 1043 (1993). *See also Atkins v. Commonwealth*, 510 S.E.2d 445, 456 (Va. 1999) (vacating sentence for failure to use statutory form). Further, the Warden argued that the opinion in *Powell* concerning the verdict form was advisory, *dictum*, and mistaken, in that it failed to address, much less overrule, the Virginia Supreme Court's own prior precedents

[1] The Virginia Supreme Court denied relief on Morrisette's first contention. (App. 15). That ruling is not at issue in this certiorari petition.

expressly upholding the statutory verdict form against the same challenge Morrisette asserted as grounds for his ineffective assistance claim.

3. The Habeas Decision Below

In its published June 3, 2005, Order granting habeas relief in Morrisette's case, the Virginia Supreme Court made clear its determination that a capital case defendant should receive a penalty phase verdict form providing specificity in sentencing options greater than what is constitutionally or statutorily required. The state habeas court (1) reviewed its prior precedents that discussed the statutory verdict form; (2) adopted the *dictum* in *Powell*; and (3) *overruled Mueller* and *Roach*, two direct appeal decisions which specifically had rejected arguments that a defendant was entitled to separate verdict forms which expressly gave the option of life imprisonment after finding an aggravating circumstance. (App. 16-23). The Court held as follows:

> Because Morrisette is claiming counsel was ineffective for failing to object to the use of the defective verdict form, we must determine whether counsel's failure was unreasonable and, if so, whether counsel's error undermines the Court's confidence in the outcome of the proceeding. As to the "performance" prong of the *Strickland* test, we hold that the representation provided to Morrisette by his trial counsel "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. This Court issued its decision in *Powell* approximately two months before the commencement of Morrisette's trial. We succinctly stated our holding in *Powell*: "in a capital murder . . . trial, the trial court must give the jury verdict forms providing expressly for the imposition of a sentence of imprisonment for life

and a fine of not more than $100,000 when the jury finds that one or both of the aggravating factors have been proven beyond a reasonable doubt." 261 Va. at 545, 552 S.E.2d at 363. In light of that holding, any reasonably competent attorney would have known that it was imperative that he or she object to a verdict form that did not expressly include that sentencing option. *See Green v. Young*, 264 Va. 604, 609, 571 S.E.2d 135, 138 (2002) (reasonably competent attorney would have objected to a jury instruction that was clearly erroneous and violated the procedural safeguard requiring the prosecution to prove every element of the charged offense beyond a reasonable doubt).

We also find that trial counsel's deficient performance prejudiced Morrisette's defense. In both *Atkins* and *Powell*, we recognized that a jury is likely to be confused when there is a conflict between the sentencing instructions and the verdict form. The conflict in this case existed because the jury was instructed that it could sentence Morrisette to life imprisonment with or without a fine even if it found that the Commonwealth had proven one or both aggravating factors beyond a reasonable doubt. However, the verdict form did not contain a separate paragraph expressly stating that sentencing option.

Thus, we conclude that "there is a reasonable probability that, but for counsel's . . . error [in failing to object to the incomplete verdict form], the result of the proceeding would have been different," i.e., the jury would not have imposed the death penalty. *Strickland*, 466 U.S. at 694. The implicit jury confusion caused by the conflict between the instructions and the verdict form was "sufficient to undermine confidence in the outcome." *Id.*

(App. 23-25, footnotes omitted, ellipsis and brackets in original).

4. Facts of the Crime

Morrisette was charged with the capital murder of Dorothy White based on a "cold hit" match between Morrisette's DNA profile and evidence recovered from his victim. Ms. White's body was discovered in the kitchen of her Hampton, Virginia home on July 25, 1980. She had been stabbed in her neck, chest, abdomen and flank. One stab wound penetrated her heart. Ms. White also suffered a slash wound across her throat severing her trachea, her right carotid artery, and her jugular vein. The wound also partially severed her esophagus. Defensive wounds on her hands and legs indicated that Ms. White attempted to fight off her assailant.

Several of her stab wounds individually would have been fatal. The slash wound to her neck was "fatal within minutes," but did not cause unconsciousness immediately. Instead, because her windpipe was cut, her blood flowed down her airway effectively causing her to drown in her own blood.

The room where Ms. White's body was found was splattered with blood but the remainder of the house was not disturbed. There was no evidence of a forced entry. Ms. White's blouse and bra had been pulled up, exposing her breasts. She wore no other clothing. A "milky-looking substance [that] appeared to be wet" was noticed on her pubic hair. Testing revealed intact spermatozoa on samples taken from Ms. White's vulva, vagina and cervix.

Morrisette was interviewed by police in 1980 as one of several possible suspects, but no one was charged with the murder at that time. In 1999, Hampton police officers submitted evidence from the murder to the Virginia Forensic Laboratory DNA databank for comparison.

Morrisette's DNA profile had been included in the data-bank after his convictions subsequent to the murder. Morrisette's DNA profile was a "cold hit" match with the samples recovered from Ms. White's body. The probability of randomly selecting someone other than Morrisette with that DNA profile is one in 900 million in the Caucasian population, one in 1.2 billion in the African-American population and one in 800 million in the Hispanic population. (App. 35-38).

The Supreme Court of Virginia on direct appeal found the facts regarding the sentencing phase of trial to be as follows:

> In the penalty phase of the trial, the Commonwealth introduced photographs of the victim as evidence of the vileness of the murder. The Commonwealth also argued that Morrisette was a future danger to society, introducing evidence of his previous convictions for abduction and maiming in 1986, for burglary in 1984, and for driving under the influence of alcohol in 1999.
>
> The victim of the prior abduction and maiming testified that Morrisette had attacked her as she sat in a car parked outside a high school, waiting for her daughter to emerge from band practice. He had a knife and pushed her down onto the car seat, trying to gag her. Morrisette cut her jawbone and neck, fleeing only when other vehicles approached.
>
> In mitigation, Morrisette and the Commonwealth stipulated that, according to a deputy at the regional jail where Morrisette had been incarcerated prior to trial, Morrisette was a model inmate with a positive attitude. Morrisette's daughter and sister testified as to his affection for his family.

(App. 38-39).

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED

The Virginia Supreme Court vacated Morrisette's presumptively valid sentence of death in a collateral review ruling that violates this Court's settled Sixth Amendment precedents in two important respects. First, the state habeas court has placed itself within a recent unsettling trend holding that, contrary to this Court's precedents and those of other state and federal lower courts, a claim of ineffective assistance of counsel should be granted when a defense attorney fails to foresee a change in the law and thus to make an objection which is contrary to then-existing, settled precedent. This Court rejected such an unworkable, hindsight approach to reviewing an attorney's performance over 20 years ago in *Strickland v. Washington*, 466 U.S. 668 (1984).

Even more disturbing, the Virginia Supreme Court's ruling on *Strickland* prejudice places it in direct conflict with this Court's decisions and the decisions of numerous lower courts, but in agreement with erroneous decisions of other lower courts, some of which this Court has found necessary to correct in the recent past. The Virginia Supreme Court gave lip-service only to this Court's commands in *Strickland*, while in fact finding that the underlying "error" itself automatically satisfied the prejudice component of *Strickland*'s test. In so doing, the lower court has undermined this Court's precedents establishing that the prejudice flowing from an unprofessional error of counsel, sufficient to overturn a criminal judgment under the Sixth Amendment, actually must demonstrate a reasonable probability of a different result.

This is the only forum in which the Virginia Supreme Court's erroneous decision vacating a sentence of death can be corrected. Unlike a state prisoner, the Commonwealth of Virginia has no recourse through the avenue of

federal habeas corpus review. *Morrisette* is a published decision that other courts which are inclined to disregard the Sixth Amendment standard surely will consider and follow. Certiorari should be granted to dispel any notion that *Strickland* does not require trial counsel to be clairvoyant and does not permit prejudice to be presumed.[2]

I. An Irreconcilable Conflict Exists Between The Supreme Courts Of Virginia, Kansas And Indiana On The One Hand, And The Second, Fourth, Tenth, Eighth, And Eleventh Circuits And The Supreme Courts Of Iowa And Florida On The Other Hand, On The Issue Of Whether Trial Counsel Is Required To Foresee Changes In The Law.

The decision of the Virginia Supreme Court conflicts with the United States Courts of Appeals and State Supreme Courts which hold that, under *Strickland v. Washington*, courts reviewing claims of ineffective assistance of counsel may not require trial counsel to foresee future changes in the law. *See, e.g., Spears v. Mullin*, 343 F.3d 1215, 1250 (10th Cir. 2003) (rejecting ineffective assistance claim that counsel failed to object to a "flight" instruction which, after the prisoner's trial, was held by the state appellate court to be invalid in a decision reversing decades of jurisprudence on the issue), *cert. denied*, 541 U.S. 909 (2004); *Brown v. United States*, 311 F.3d 875, 878 (8th Cir. 2002) ("counsel's decision not to raise an issue unsupported by then-existing precedent did not constitute ineffective assistance" even though an objection based on *United States v. Apprendi*, 530 U.S. 466 (2000), was reasonably available before the case was

[2] Henceforth in this petition, the Warden's reference to "*Morrisette*" indicates the Virginia Supreme Court's published habeas corpus decision found in the Petitioner's Appendix at pages 1-31.

decided), *cert. denied*, 540 U.S. 891 (2003); *United States v. Bustos de la Pava*, 268 F.3d 157, 166 (2d Cir. 2001) (no ineffectiveness where, at time of trial, no court of appeals had held that an indictment could be dismissed for a violation of the Vienna Convention); *Smith v. Singletary*, 170 F.3d 1051, 1054 (11th Cir. 1999) ("the rule that an attorney is not liable for an error of judgment on an unsettled proposition of law is universally recognized. . . ."); *Kornahrens v. Evatt*, 66 F.3d 1350, 1360 (4th Cir. 1995) ("the case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law" even though this Court had granted certiorari on the issue and struck down state law six months later), *cert. denied*, 517 U.S. 1171 (1996); *State v. Liddell*, 672 N.W.2d 805, 814 (Iowa 2003) ("Counsel need not be a crystal gazer; it is not necessary to know what the law will become in the future to provide effective assistance of counsel."); *Anderson v. State*, 822 So.2d 1261, 1268 (Fla. 2002) ("counsel not ineffective for failing to foresee subsequent case law that may have benefited the defendant").

The Virginia Supreme Court's decision in *Morrisette* regrettably joins other jurisdictions which recently have strayed from this Court's admonitions that the Constitution does not demand that trial counsel must divine where the appellate courts will land in the future. In *Laymon v. State*, 122 P.3d 326, 2005 Kansas LEXIS 770 (Kan. 2005), the Kansas Supreme Court made the same error as the Virginia Supreme Court, holding that counsel were ineffective on direct appeal because they did not raise an issue which had been percolating in the appellate courts but was not decided favorably to defendants until after Laymon's direct appeal: "[a]lthough *McAdam* had not yet been decided by this court when Laymon's direct appeal brief was filed and his oral argument heard, the state of the developing Kansas law counseled in favor of preserving the line of argument." *Laymon*, LEXIS page *31-32.

In *Fisher v. State*, 810 N.E.2d 674 (Ind. 2004), the Indiana Supreme Court made the same error as the Virginia Supreme Court. It held that, although (1) "[t]here is no question that at the time of Fisher's trial and appeal in 1993-1995, the law on the matter of lesser-included offenses was in a state of flux," (2) there were two contradictory lines of authority from the state supreme court on the matter, and (3) the issue was not decided until shortly after Fisher's appeal in a decision which overruled prior precedent, Fisher's counsel on direct appeal nevertheless was ineffective because he did not raise the issue on appeal. The court held: "precisely because the law in this area was unsettled and in a state of flux at the time of Fisher's trial and appeal, the issue of whether the trial court erred in refusing to give a lesser-included instruction on reckless homicide was both significant and obvious as well as clearly stronger than the issues raised." 810 N.E.2d at 679.

The decision in *Morrisette*, like those in *Laymon* and *Fisher*, irreconcilably conflicts with *Strickland v. Washington*'s requirement that counsel's performance be judged "on the facts of the particular case, viewed as of the time of counsel's conduct." 466 U.S. at 690. *See also Murray v. Carrier*, 477 U.S. 478, 486 (1986) (holding that a claim of ineffective assistance of counsel as "cause" to excuse a default on federal habeas review must meet *Strickland*'s test, the Court noted that, "the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default"); *Smith v. Murray*, 477 U.S. 527, 536 (1986) (rejecting claim that trial counsel was ineffective because his perception of state law later would be shown incorrect by a subsequent court ruling, and observing that, "[i]t will often be the case that even the most informed counsel will fail to anticipate a state appellate court's willingness to reconsider a prior holding . . . .").

In *Strickland*, the Court emphasized that the Sixth Amendment standard required the reviewing court to strongly presume that counsel's conduct was reasonable, based "on the facts of the particular case, viewed as of the time of counsel's conduct." 466 U.S. at 690.

> It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Id. at 689.

In finding deficient performance by Morrisette's trial counsel, the Virginia Supreme Court focused on an extremely narrow consideration: in *Powell v. Commonwealth*, issued just two months before Morrisette's trial, the Virginia Supreme Court gratuitously suggested that the statutorily-mandated verdict form used in capital cases for two decades should not be used in future trials. (App. 23-24). *See Powell*, 552 S.E.2d at 361 (having reversed on other grounds, discussion of different claim about verdict forms "will be instructive to future capital murder trials"). The court in *Morrisette*, however, ignored the impact of countervailing circumstances that also existed at the time trial counsel were representing Morrisette: binding authority from the Virginia Supreme Court and this Court was irreconcilable with the *dictum* in *Powell*, and the state court failed to resolve the conflict in authority in *Powell*.

Prompted by the Warden's argument below, the Virginia Supreme Court now has had to acknowledge that, before *Powell* was decided, a separate line of authority

from the Virginia Supreme Court expressly had approved of a penalty phase verdict form that followed the statutory model. (App. 18-23). In *Roach* and *Mueller*, the state court had rejected the arguments that the statutory verdict form was confusing or incomplete. *Roach*, 468 S.E.2d at 105; *Mueller*, 422 S.E.2d at 396-397. In Morrisette's case, the Virginia Supreme Court expressly recited the precise arguments which had been made in the briefs filed by Roach and Mueller (App. 19, 21), confirming that the same argument made by Morrisette had been considered and rejected by the court in *Roach* and *Mueller*. *Mueller* and *Roach* were binding authority at the time Morrisette was tried and sentenced.

Additionally, at the time Morrisette was tried, this Court, in *Weeks v. Angelone*, 528 U.S. 225 (2000), already had rejected the same argument about Virginia's verdict form which Justice Stevens suggested in his dissenting opinion:

> Justice Stevens' arguments concerning the lack of a jury verdict form stating that the jury finds one or both aggravating circumstances and sentences the petitioner to life imprisonment miss the mark. The life sentence verdict forms do not suggest that a prerequisite for their use is that the jury found no aggravating circumstances.

528 U.S. at 235 n.4.[3] *See also Buchanan v. Angelone*, 522 U.S. 269, 277 (1998) (Virginia's sentencing "instruction informed the jurors that if they found the aggravating factor proved beyond a reasonable doubt then they 'may fix' the penalty at death, but directed that if they believed that all the evidence justified a lesser sentence then they 'shall' impose a life sentence. The jury thus was allowed to impose a life sentence even if it found the aggravating

[3] Weeks' jury was given the same statutory verdict form that Morrisette's jury considered. *See Weeks*, 528 U.S. at 247 n.8.

factor proved."). Chief Justice Rehnquist's opinion for the Court in *Buchanan* rejected the dissent's theory that the instruction might be read as limiting a life sentence to circumstances where an aggravating circumstance is not found, *because the dissenting theory "does not make sense." Id.* at 277 n.4 (emphasis added).

And the Fourth Circuit, as early as 1984, reached this same conclusion:

> Our view finds further support in the trial judge's reading of the statutory jury verdict forms for each of the capital murders, which contained the phrases "having considered the evidence in mitigation of the offense" and "having considered all the evidence in aggravation and mitigation of such offense." This language is mandated by Va. Code § 19.2-264.4D and was also embodied in the written verdict forms upon which the jury rendered its sentencing decision for each murder. Thus, the jury was instructed no less than five times to consider "all the evidence," the evidence in "mitigation," or both, in arriving at its verdicts. The instructions leave the definite impression that the jury was to take into account such evidence as was presented in mitigation and to exercise discretion in reaching a verdict on sentencing, *rather than automatically imposing the death sentence upon finding an aggravating circumstance.*

Briley v. Bass, 750 F.2d 1238, 1243-1244 (4th Cir. 1984) (emphasis added, footnote omitted), *cert. denied*, 470 U.S. 1088 (1985); *accord Graham v. Angelone*, No. 99-4, 1999 U.S. App. LEXIS 22080 at *55-56 (4th Cir. 9/13/99) (unpub.), *cert. denied*, 528 U.S. 1058 (1999).

Powell did not overrule *or even mention* the Virginia court's own well-established line of authority holding to the contrary, much less the conflicting authority from this or other courts. Recognizing this circumstance in Morrisette's

habeas case, the Virginia Supreme Court finally settled the conflict concerning what verdict form must be used by adopting the *dictum* in *Powell* and finally expressly overruling *Roach* and *Mueller*. (App. 23). The court, however, inexplicably ignored the effect of its monumental action on Morrisette's claim that his trial counsel was ineffective for failing to make a challenge under *Powell*.

On the day *before Powell* was decided, the statutory verdict form was required by legislative mandate, was constitutional and, under the Virginia Supreme Court's own precedent, was complete and "fully advised the jury of its sentencing options." *See Mueller*, 422 S.E.2d at 396-397. On the day *after Powell* was decided, and at the time of Morrisette's trial, the same verdict form still was required by statute, still was constitutional, and *Roach* and *Mueller* still were good law. Although *Powell* was decided two months before Morrisette's trial, and even assuming that trial counsel reasonably can be held to have learned about the state court's decision in *Powell* within two months, *Powell* only raised more issues than it resolved. Great uncertainty in the law regarding verdict forms in Virginia was caused by *Powell*'s *dictum* and that confusion continued until June 3, 2005, when the state court decided Morrisette's habeas case.[4]

The Virginia Supreme Court decided to settle that conflict of state law in Morrisette's case in 2005 by *overruling* its own binding precedent. The Virginia Supreme Court

[4] The state court's opinion in *Powell* had not set out the specific verdict forms which were granted and refused in that case. Thus, the actual verdict form disapproved by the court was not obvious from the opinion itself. The court's opinions in *Roach* and *Mueller* also had not set out the verdict forms at issue in those direct appeals. The habeas decision in Morrisette's case was the first time the various verdict forms all were collected and published to make the comparisons fully available to the courts and attorneys trying capital murder cases.

clearly erred in its hindsight conclusion that reasonable trial counsel were obligated in 2001 to *foresee* the court's ultimate resolution in 2005 of its two lines of conflicting authority. If it is necessary to overrule prior precedent – that *contemporaneously validated* trial counsel's conduct – in order to be able to conclude with any measure of certainty that trial counsel actually committed an error four years earlier, a reviewing court may not find counsel's lack of clairvoyance sufficient to constitute constitutionally deficient performance under *Strickland v. Washington*.

As a published opinion, *Morrisette* stands as authority which other courts may rely upon. The Court should grant certiorari to resolve the split among the lower courts and to correct this erosion of *Strickland*'s command that defense counsel's performance may not be judged based on later-occurring events.

II. The Decisions Of The Supreme Court Of Virginia And The Sixth And Second Circuits Irreconcilably Conflict With The Fourth, Fifth, Eighth, Ninth, Tenth And Eleventh Circuits On The Issue Of Whether A Court Reviewing A Claim Of Ineffective Assistance May Presume Prejudice.

The Virginia Supreme Court's finding of prejudice cannot be sustained under *Strickland*. In its perfunctory, two-paragraph declaration of prejudice, the lower court, looking at nothing more than the verdict forms on their face, simply stated that the jury was "likely to be confused" because a "conflict" existed between Instruction Number One (that the jury could sentence Morrisette to life even if it found the existence of aggravating factors) and the verdict form which, according to the court's view in *Powell*'s *dictum*, "did not contain a separate paragraph expressly stating that sentencing option." (App. 24).

Without any analysis whatsoever, the court summarily concluded:

> Thus, we conclude that "there is a reasonable probability that, but for counsel's . . . error [in failing to object to the incomplete verdict form], the result of the proceeding would have been different," *i.e.*, the jury would not have imposed the death penalty. *Strickland*, 466 U.S. at 694. The implicit jury confusion caused by the conflict between the instructions and the verdict form was "sufficient to undermine confidence in the outcome." *Id.*

(App. 25, ellipsis and brackets in original). The court parroted the words of *Strickland*, but in fact presumed prejudice based upon "implicit jury confusion." (App. 25). Such a conclusion might be appropriate in finding reversible error on direct appeal, but it cannot substitute for the controlling Sixth Amendment standard.

First, it squarely conflicts with the majority of federal Courts of Appeals. *See Washington v. Moore*, 421 F.3d 660, 662 (8th Cir. 2005) (prejudice on a claim of ineffective assistance of counsel may be presumed only under the limited circumstances outlined in *United States v. Cronic*, 466 U.S. 648, 658-59 (1984))[5]; *Turrentine v. Mullin*, 390 F.3d 1181, 1207-08 (10th Cir. 2004) (same), *cert. denied*, 125 S.Ct. 2544 (2005); *James v. Harrison*, 389 F.3d 450, 455-56 (4th Cir. 2004) (same), *cert. denied*, 125 S.Ct. 1945 (2005); *United States v. Gurolla*, 333 F.3d 944, 958 (9th Cir.) (same), *cert. denied*, 124 S.Ct. 496 (2003); *Haynes v.*

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[5] Prejudice may be presumed only when there is a complete denial of counsel, where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing and where counsel is called upon to render assistance under circumstances where competent counsel very likely could not do so. *Bell v. Cone*, 535 U.S. 685, 695-96 (2002), *citing Cronic*, 466 U.S. at 659.

Cain, 298 F.3d 375, 381 (5th Cir.) (same), *cert. denied*, 537 U.S. 1072 (2002); *Johnson v. Alabama*, 256 F.3d 1156, 1187 n.17 (11th Cir. 2001) (same), *cert. denied*, 535 U.S. 926 (2002).

At the same time, the Virginia Supreme Court's decision is in agreement with the Sixth Circuit's refusal to follow this Court's command that prejudice may not be presumed except in the most unusual circumstances. *See Mitchell v. Mason*, 325 F.3d 732, 741-42 (6th Cir. 2003), *cert. denied*, 125 S. Ct. 861 (2005); *French v. Jones*, 332 F.3d 430, 436-38 (6th Cir.), *cert. denied*, 540 U.S. 1018 (2003). Indeed, in *Bell v. Quintero*, 161 L.Ed.2d 506, 509-10 (2005), Justice Thomas, dissenting from the denial of certiorari, pointed out the Sixth Circuit's persistent inconstancy on this issue.

The Virginia Supreme Court also joins the Second Circuit in its misinterpretation of *Strickland*'s prejudice requirement. In a case strikingly similar to Morrisette's case, the Second Circuit held that it would presume prejudice because trial counsel did not object to a jury instruction on reasonable doubt. *Bloomer v. United States*, 162 F.3d 187, 194-95 (2d Cir. 1998). Erroneously confusing harmless error review on direct appeal with *Strickland*'s command that the prisoner must prove actual prejudice, the court held: "we conclude Bloomer suffered prejudice from his counsel's failure to object to these instructions or to challenge them on appeal regardless of the strength and quantity of evidence against him." *Id.* These disloyal lower court decisions corrupt *Strickland*'s reasoning and holding. Certiorari review should be granted to resolve this obvious conflict among the courts.

Second, the Virginia Supreme Court's rejection of *Strickland*'s "actual prejudice" requirement directly conflicts with this Court's precedents, a conflict which this Court has not hesitated to correct in other similar cases.

See Florida v. Nixon, 543 U.S. 175,125 S.Ct. 551, 561-62 (2004) (reversing Florida Supreme Court on state post-conviction review because court held prejudice should be presumed from trial counsel's decision to concede guilt and thus failed to hold prisoner to standard commanded by *Strickland*); *Bell*, 535 U.S. at 693 (reversing Sixth Circuit's judgment that some forms of ineffective assistance claims require no showing of prejudice); *see also Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000) (reversing Ninth Circuit because court had "applied a *per se* prejudice rule, and granted habeas relief based solely upon a showing that counsel had performed deficiently under its standard.").

The lower court's ruling strikes at the heart of *Strickland*'s long-established command that actual prejudice must be proven by the petitioner making a Sixth Amendment claim. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. "[T]he defendant must show that [errors] actually had an adverse effect on the defense." *Id.* at 693. "Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial." *Id.* "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

In Morrisette's case, Justice Kinser's dissenting opinion, joined by Justices Lemons and Agee, correctly assessed prejudice under *Strickland*. It observed that the decades-old *statutorily-required* verdict form "should not be looked at in isolation but rather as part of the overall instructions given to the jury during the penalty proceeding." (App. 27). Indeed, the majority below did not recite a single instruction given to the jury. The dissent, however, properly considered Instruction Number One which was given to the jury:

You have convicted the defendant of an offense which may be punishable by death. You must decide whether the defendant shall be sentenced to death or to imprisonment for life and a fine of a specific amount, but not more than $100,000.00. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following aggravating circumstances:

(1) That, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or

(2) That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt either of these circumstances, then you may fix the punishment of the defendant at death. *But if you nevertheless believe from all the evidence, including evidence in mitigation, that the death penalty is not justified, then you shall fix the punishment of the defendant* at:

(1) Imprisonment for life; or

(2) Imprisonment for life and a fine of a specific amount, but not more than $100,000.00.

Any decision you make regarding punishment must be unanimous.

(App. 28-29) (emphasis added). Instruction Number One, however, was not the only instruction the trial court gave Morrisette's jury regarding the life-sentence option. The

court further explicitly directed the jury in Instruction Number Six:

> *If you find that the Commonwealth has proved beyond a reasonable doubt the existence of an aggravating circumstance*, in determining the appropriate punishment you shall consider any mitigation evidence presented of circumstances which do not justify or excuse the offense but which in fairness or mercy may extenuate or reduce the degree of moral culpability and punishment.

(App. 56) (emphasis added).

The Virginia Supreme Court failed to consider the effect of these instructions; indeed, *there is no dispute* that the trial court's instructions accurately and completely instructed the jury about all of its sentencing options. (App. 28). As the dissenting Justices observed, "[t]he jury was clearly instructed that, if it found the Commonwealth had proven either of the aggravating factors beyond a reasonable doubt, it 'may' fix punishment at death; but that, if it nevertheless believed from all the evidence, including evidence in mitigation, the death penalty was not justified, it 'shall fix' punishment at life imprisonment or life imprisonment and a fine." (App. 29-30). The trial court's further instruction expressly informing the jury that, if it found an aggravating factor, it nevertheless must consider whether mitigating evidence "reduce[d] . . . punishment," (App. 56), completely negates any possibility of "confusion" as to the jury's discretion to fix a life sentence after finding an aggravating factor. It certainly cannot be presumed that the jury was confused to the point that it ignored its instructions and mistakenly sentenced Morrisette to death.

Following the custom in Virginia criminal trials, the trial court provided the jury with these instructions before final argument from counsel. Then, after final argument,

the trial court further instructed the jury by reading to them the verdict forms which provided five separate options: (1) find future dangerousness and vileness and sentence to death; (2) find future dangerousness and sentence to death; (3) find vileness and sentence to death; and the following two separate options for a life sentence:

> We, the Jury, . . . having found the defendant guilty of capital murder and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.
>
> [or]
>
> We, the Jury, . . . having found the defendant guilty of capital murder and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life and a fine of $ _____. (fine must not be more than $100,000.00).

(App. 13-15). The first life-option form is verbatim from Virginia Code § 19.2-264.4. (App. 55). The second life-option form included a monetary fine and conformed not only to Virginia Code § 18.2-10, Virginia's statute setting forth available penalties for capital murder, but also complied with *Powell* which, while stating its *preference* for more specific verdict forms, actually identified only one conflict between the statutory verdict form and the punishment statute: a lack of provision in the verdict form for a monetary fine. *Powell*, 552 S.E.2d at 363.[6]

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[6] As even the majority observed, the Virginia General Assembly revised § 19.2-264.4 after *Powell* to correct the one inconsistency identified by the court, the lack of a provision in the verdict form for a monetary fine. (App. 13). The legislature, however, did not see, and still has not seen, fit to revise the verdict form to provide for the more specific wording suggested in *Powell*'s *dictum*.

Properly considering the whole record and *all* the pertinent instructions in determining prejudice under *Strickland*, the three dissenting Justices correctly agreed with this Court and concluded that the statutory verdict form, which expressly permitted the jury to sentence Morrisette to life after having considered all the evidence in aggravation and mitigation, was not confusing or in conflict with the instructions. (App. 30). The statutorily-mandated verdict form fully advised the jury of its sentencing options and beyond dispute provided an accurate means to effect a finding of life imprisonment even after finding an aggravating circumstance:

> [T]he jury was instructed that, even if it found one or both aggravating factors, it could sentence Morrisette to life imprisonment or life imprisonment and a fine if it believed, after considering all the evidence including mitigating evidence, that the death penalty was not justified. The final two paragraphs of the verdict form provided the jury with the means to effect such a finding, but the jury instead chose to fix Morrisette's sentence at death.

(App. 30).

The dissent's view is precisely how this Court and the United States Court of Appeals for the Fourth Circuit always have understood Virginia's standard sentencing instructions and statutory verdict form, as discussed in Argument I. *See Weeks*, 528 U.S. at 235 n.4; *Buchanan*, 522 U.S. at 277 & n.4; *Briley*, 750 F.2d at 1243-1244; *Graham*, No. 99-4, 1999 U.S. App. LEXIS 22080 at *55-56.

Indeed, as shown in Argument I, until the state court's habeas decision below, the Virginia Supreme Court always had rejected the argument that Virginia's statutory instructions and verdict forms did not allow the jury to

return a life sentence if it found an aggravating factor.[7] The majority in Morrisette's case described the claims made by the appellants in *Roach* and *Mueller* in identical terms to the claim raised by Morrisette (App. 19, 21), and did not contend that the instructions and verdict form used in Morrisette's case suddenly had become inherently inaccurate, incomplete, or confusing as a matter of law since *Atkins*, *Roach* and *Mueller* were decided.

The *dictum* in *Powell* and the decision in *Morrisette* simply expressed the state court's preference for a different form to avoid the *possibility* of jury confusion, a conclusion which is a far cry from what this Court has accepted as an adequate showing of *Strickland* prejudice. The constitutional standard this Court endorses demands that a reviewing court find *"a reasonable probability that,* but for counsel's unprofessional errors, *the result of the proceeding would have been different." Strickland*, 466 U.S. at 694 (emphasis added). The Virginia Supreme Court recited these words but only as a self-proving conclusion that did not fit either the facts of Morrisette's case or the court's own description of the case. It did not explain how there could be a reasonable probability of a different result where there is, by the court's own words, only a possibility of jury confusion.[8]

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[7] In *Atkins v. Commonwealth*, the court vacated the death sentence because the trial court *failed* to provide the jury with the statutory verdict form. The state Supreme Court held that the principle, "it is materially vital to the defendant in a criminal case that the jury have a proper verdict form," always has been met by using the statutory verdict form, and specifically referred to the form as the "proper verdict form." 510 S.E.2d at 456.

[8] The court's conclusion is all the more inexplicable given the fact that it expressly rejected Morrisette's complaint that error in the verdict form constituted any sort of "structural" error. (App. 24 n.10).

In fact, the court's conclusion runs directly contrary to *Strickland* which presumes that the jury acted according to law:

> In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. *The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision.*

Strickland, 466 U.S. at 694-695 (emphasis added). Moreover, jurors are *presumed to follow the court's instructions. Weeks*, 528 U.S. at 234. "[W]e presume that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." *Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985). *See United States v. Olano*, 507 U.S. 725, 740 (1993). *Morrisette* reverses that presumption by concluding, without any basis in the record, that prejudice is shown under *Strickland* based simply upon a speculative, "implicit" possibility of "confusion" in *defiance* of the trial court's instructions. The state court's analysis impermissibly conjoined the two *Strickland* inquiries into one, finding that prejudice was shown simply by showing that counsel's performance was unreasonable.

Obviously, speculating that a jury might have been confused is not a valid basis to set aside a criminal judgment even on direct review, much less in a collateral action.

> Although a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction, a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a possibility of such an inhibition. This "reasonable likelihood" standard, we think, better accommodates the concerns of finality and accuracy than does a standard which makes the inquiry dependent on how a single hypothetical "reasonable" juror could or might have interpreted the instruction. There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case, but there is an equally strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation. Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Boyde v. California, 494 U.S. 370, 380-381 (1990) (footnote omitted). Applying *Boyde*, this Court ruled that Virginia's pattern capital sentencing instruction and statutory verdict form do *not* create a reasonable likelihood that a jury would feel precluded from considering mitigating evidence or returning a life sentence after finding aggravating circumstances. *Weeks*, 528 U.S. at 235-236 and n.4.

Furthermore, this Court long has emphasized that a prisoner has a greater burden to prove prejudice in a collateral attack than on direct appeal. *Brecht v. Abrahamson*, 507 U.S. 619, 633-635 (1993); *United States v. Frady*, 456 U.S. 152, 164 (1982). "The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal." *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). A prisoner must show that a flawed jury "instruction by itself so infected the entire trial that the resulting conviction violates due process, not merely whether the instruction is undesirable, erroneous, or even universally condemned." *Frady*, 456 U.S. at 169 (internal quotation marks omitted); *Henderson*, 431 U.S. at 154; *Cupp v. Naughten*, 414 U.S. 141, 146-147 (1973). Unless an error in an instruction can be characterized as "prejudice *per se*," regardless of the circumstances of the individual case, the prisoner must shoulder the burden of demonstrating that errors "worked to his actual and substantial disadvantage," infecting his entire trial with error of constitutional dimension." *Frady*, 456 U.S. at 170.

The Virginia Supreme Court ignored the significant fact that this is a *collateral* attack on a presumptively valid final criminal judgment which imposes a greater burden on a prisoner than on a direct appeal defendant, *and* that this is a Sixth Amendment challenge under *Strickland* where prejudice must be *proved, not presumed*. *See Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986) (a claim that evidence should have been suppressed and a claim of ineffective assistance for failing to move to suppress are not the same: "the two claims are . . . distinct, both in nature and in the requisite elements of proof."). Given the historical understanding of the statutory verdict

form by all courts, and reading the verdict form with the trial court's instructions as the reviewing court was obligated to do, the Virginia Supreme Court's finding of *Strickland* prejudice from the use of the statutory verdict form cannot be sustained as a valid application of controlling Sixth Amendment precedent of this Court.

Finally, it does not appear that the lower court's erroneous application of *Strickland* prejudice in this case is an anomaly. Just three months after its opinion in Morrisette's case, the Virginia Supreme Court issued an opinion in an unrelated habeas corpus case in which the court demonstrated without question that its error in *Morrisette* was not an isolated mistake. In *Jackson v. Warden*, 619 S.E.2d 92 (Va. 2005), the Virginia Supreme Court, in a 5-2 split decision, jettisoned *Strickland*'s prejudice requirement altogether and granted relief on an ineffective assistance of counsel claim in a burglary case because the trial attorney did not object, under *Estelle v. Williams*, 425 U.S. 501 (1976), to Jackson appearing for trial in prison clothing. 619 S.E.2d at 93. As the dissenting Justices pointed out, the majority in *Jackson* failed even to mention the "reasonable probability of a different result" test for prejudice required by *Strickland*. *Id.* at 98 (Kinser, J., dissenting). The majority's ruling instead was based solely on the claim of trial court error itself. 619 S.E.2d at 97 ("Our task is not to independently weigh the evidence. . . . Rather, we evaluate the likely effect of . . . [the underlying error] 'based on reason, principle, and common human experience' ") (quoting *Estelle v. Williams*).

Such authority from Virginia's highest court on a matter affecting death penalty cases which so clearly conflicts with other courts, compels the grant of certiorari. The lower court's retreat from the controlling standard undermines binding precedent. Unless corrected, it will stand as persuasive authority for other courts which may

seek to use the Sixth Amendment as a vehicle for hindsight creation of attorney errors despite *Strickland v. Washington*'s express admonition to the contrary:

> The object of an ineffectiveness claim is not to grade counsel's performance .... Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

466 U.S. at 697.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond, on Friday, the 3rd day of June, 2005.

William Wilton Morrisette, III, Petitioner,

against Record No. 040275

Warden of the Sussex I State Prison, Respondent.

Upon a Petition for a Writ of Habeas Corpus

In August 2001, a jury in the Circuit Court for the City of Hampton convicted William Wilton Morrisette, III of rape and capital murder during the commission of rape. Finding that the Commonwealth had proven beyond a reasonable doubt both aggravating factors of "future dangerousness" and "vileness," *see* Code § 19.2-264.2, the jury fixed Morrisette's sentence at death on the capital murder conviction and at life imprisonment on the rape conviction. The trial court sentenced Morrisette in accordance with the jury's verdict. This Court affirmed the convictions and the sentence of death. *Morrisette v. Commonwealth*, 264 Va. 386, 400, 569 S.E.2d 47, 56 (2002), *cert. denied*, 540 U.S. 1077 (2003).

Pursuant to the provisions of Code § 8.01-654(C), Morrisette filed a petition for writ of habeas corpus against the warden of the Sussex I State Prison (Warden). In his petition, Morrisette raises claims of substantive errors and claims of ineffective assistance of counsel during the guilt and penalty phases of his trial. The Court will first address Morrisette's claims concerning the guilt phase of his trial. The Court will then address Morrisette's penalty phase claims.

I. GUILT PHASE ISSUES

A. PROCEDURAL DEFAULTS

A petition for writ of habeas corpus is not a substitute for an appeal or a writ of error. *Slayton v. Parrigan*, 215 Va. 27, 29, 205 S.E.2d 680, 682 (1974), *cert. denied*, 419 U.S. 1108 (1975); *Brooks v. Peyton*, 210 Va. 318, 321-22, 171 S.E.2d 243, 246 (1969).

> The trial and appellate procedures in Virginia are adequate in meeting procedural requirements to adjudicate State and Federal constitutional rights and to supply a suitable record for possible habeas corpus review. A prisoner is not entitled to use habeas corpus to circumvent the trial and appellate processes for an inquiry into an alleged non-jurisdictional defect of a judgment of conviction.

Slayton, 215 Va. at 30, 205 S.E.2d at 682. Thus, when an issue of an alleged constitutional defect could have been raised and adjudicated at trial and upon appeal to this Court, a petitioner lacks standing to raise the claim in a petition for writ of habeas corpus. *Id.*

In claim I(A),[1] Morrisette alleges the Commonwealth acted with "reckless disregard" of the prejudicial impact that the 19-year delay between the time of the offense in 1980 and his arrest in August 1999 had on his ability to defend against the charges. In claim III(A), Morrisette alleges the trial court violated Code § 8.01-360 by qualifying a panel of only 22 jurors and granting each side only four peremptory strikes. Morrisette alleges he was entitled to an additional peremptory strike and that his due

[1] This claim is mislabeled in Morrisette's petition as claim "VI.A."

process rights were violated. Morrisette further alleges that this is a "structural error." In claim V(A), Morrisette alleges he was entitled to an instruction on the lesser-included offense of first-degree murder. We hold that claims I(A), III(A), and V(A) are procedurally defaulted because these non-jurisdictional issues could have been raised at trial and on direct appeal but were not. Thus, they are not cognizable in a petition for writ of habeas corpus. *Slayton*, 215 Va. at 29, 205 S.E.2d at 682.

In claims II(A) and (B), Morrisette alleges that, "because there was no indictment for the greater offense of death eligible capital murder, the trial court lacked jurisdiction to try petitioner for death eligible capital murder." Morrisette argues the failure to include aggravating circumstances in the indictment rendered the trial court without jurisdiction over a death eligible capital murder trial. Thus, Morrisette asserts that this challenge to the indictment is not procedurally barred under *Slayton*, 215 Va. at 29, 205 S.E.2d at 682. We disagree. The failure of an indictment to include aggravating circumstances is not a jurisdictional defect and is waived by the failure to object to the indictment before trial. *See Wolfe v. Commonwealth*, 265 Va. 193, 223-24, 576 S.E.2d 471, 488-89 (2003); Rule 3A:9(b) and (c). Thus, the rule in *Slayton* does apply, and this claim is procedurally defaulted because Morrisette failed to raise this non-jurisdictional issue at trial and on direct appeal.

B. SUBSTANTIVE ALLEGATION OF JUROR MISCONDUCT

At trial, Morrisette exercised his Fifth Amendment right against self-incrimination and chose not to testify. The jury was properly instructed that "the defendant does

not have to testify and exercise of that right cannot be considered by [the jury]." Morrisette has submitted two juror affidavits, obtained following his direct appeal, wherein the jurors state that they speculated during deliberations as to why Morrisette did not testify. In claim XI(A)(1), Morrisette asserts that his Fifth, Sixth, Eighth, and Fourteenth Amendment rights were violated when the jurors failed to follow the trial court's instructions and improperly considered his failure to testify as evidence of his guilt.

The Court rejects this claim. The Court will not receive testimony of jurors regarding their own alleged misconduct in the jury room for the purpose of impeaching their verdict. *See Kasi v. Commonwealth*, 256 Va. 407, 425, 508 S.E.2d 57, 67 (1998), *cert. denied*, 527 U.S. 1038 (1999) ("Virginia has been more careful than most states to protect the inviolability and secrecy of jury deliberations, adhering to the general rule that the testimony of jurors should not be received to impeach their verdict, especially on the ground of their own misconduct."). The Court has generally "limited findings of prejudicial juror misconduct to activities of jurors that occur outside the jury room," *Jenkins v. Commonwealth*, 244 Va. 445, 460, 423 S.E.2d 360, 370 (1992), and the Court has held that a trial judge is not required to examine jurors in response to allegations of jury misconduct that is confined to the jury room. *Id.*

C. CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

In addition to his substantive claims concerning the guilt phase of his trial, Morrisette asserts claims of ineffective assistance of counsel. As with any such claim, the two-part test enunciated in *Strickland v. Washington*, 466

U.S. 668, 687 (1984), frames our analysis. To prevail, Morrisette must first prove that his trial counsel's "performance was deficient." *Id.* This prong of the test requires a showing that "counsel's representation fell below an objective standard of reasonableness" and that counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687-88. Second, Morrisette must show that the "deficient performance prejudiced the defense," meaning that "counsel's errors were so serious as to deprive the defendant of a fair trial." *Id.* In other words, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

1. Failure to Argue the Theory of Reckless Disregard in Speedy Trial Issue on Appeal

In claims I and I(B),[2] Morrisette alleges he was denied the effective assistance of counsel on appeal because counsel failed to argue that the Commonwealth acted in "reckless disregard" of the probable prejudicial impact of the 19-year pre-indictment delay on his ability to present a defense to the charges.[3]

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[2] Again, these claims are mislabeled in Morrisette's petition as claims "VI" and "VI.B."

[3] Morrisette included this claim of ineffective assistance of counsel on appeal in his initial petition for writ of habeas corpus filed on February 6, 2004. That petition, however, exceeded the 50-page limit as required by Rule 5:7A(g), and the Court directed him to file an amended petition. In his amended petition, Morrisette added a claim that his trial counsel was ineffective for failing to make this argument. Morrisette filed the amended petition on March 5, 2004, after the applicable statute of limitations had expired. Thus, the added claim is barred

(Continued on following page)

This claim has no merit. The selection of issues to address on appeal is left to the discretion of appellate counsel, and counsel need not address every possible issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983). Furthermore, as Morrisette concedes, he did not make this specific argument at trial when he challenged the 19-year pre-indictment delay. Therefore, he would have been procedurally barred from raising the argument on appeal. *See* Rule 5:25. Appellate counsel were not ineffective for failing to present an argument that would have been procedurally defaulted.

2. Failure to Argue that the Indictment Did Not Allege Aggravating Factors

In claim II(C), Morrisette asserts counsel should have argued at trial that the indictment failed to allege the aggravating factors and that, if counsel had done so, the issue would have been preserved for appeal and this Court would have vacated his death sentence.

This claim has no merit. Contrary to Morrisette's assertion, there is no constitutional requirement that a capital murder indictment include allegations concerning aggravating factors. *See Ring v. Arizona*, 536 U.S. 584, 597 n.4 (2002) (holding that the Fourteenth Amendment has not been construed to include the Fifth Amendment right to "presentment or indictment of a Grand Jury"); *Apprendi v. New Jersey*, 530 U.S. 466, 477 n.3 (2000); *cf. Blakely v. Washington*, ___ U.S. ___, ___, 124 S.Ct. 2531, 2537-38

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pursuant to Code § 8.01-654.1. A claim of ineffective assistance of counsel at trial does not relate back to Morrisette's claim in his initial petition that appellate counsel was ineffective. *See* Code § 8.01-6.1.

(2004) (holding that a trial judge may not engage in unilateral fact-finding in order to impose a punishment which exceeds the jury's verdict). Furthermore, a defendant charged with capital murder is not entitled to a bill of particulars delineating the Commonwealth's intended aggravating factors when the indictment specifying the crime gives the defendant notice of the nature and character of the offense. *Roach v. Commonwealth*, 251 Va. 324, 340, 468 S.E.2d 98, 107 (1996). The indictment in this case gave Morrisette such notice.

3. Failure to Object to Jury Pool Size and Failure to Demand an Additional Peremptory Strike

The trial court seated a panel of 14 jurors, including two alternate jurors, from a qualified panel of 22 venirepersons. Under Code § 19.2-262(B), a panel of 20 qualified members is required in order to seat a jury of 12 persons. Pursuant to Code § 8.01-360, when a court desires to seat "two or more additional jurors . . . there shall be drawn twice as many venireman as the number of additional jurors desired. The . . . Commonwealth and accused in a criminal case shall each be allowed one additional peremptory challenge for every two additional jurors."

In claim III(B), Morrisette alleges he was denied the effective assistance of counsel because counsel failed to object to the trial court's qualification of a jury panel consisting of less than 24 venirepersons and further failed to demand an additional peremptory strike to which Morrisette alleges he was entitled by law. Morrisette claims that the court's errors were structural and that prejudice is therefore presumed.

A "structural error" is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991); *see Emmett v. Warden*, 269 Va. 164, 168, 609 S.E.2d 602, 605 (2005). As such, it is the constitutional magnitude of the error that defies "harmless error review." *Neder v. United States*, 527 U.S. 1, 8 (1999). Examples of errors which affect the framework of a trial include the denial of a public trial, the denial of counsel, the denial of an impartial trial judge, the systematic exclusion of members of the defendant's race from the grand jury, the infringement upon a defendant's right to represent himself, and the improper instruction to a jury as to reasonable doubt and the burden of proof. *See Johnson v. United States*, 520 U.S. 461, 466-67 (1997) (discussion of "limited class of cases" in which structural error found); *Green v. Young*, 264 Va. 604, 611-12, 571 S.E.2d 135, 140 (2002) (holding an instruction stating the jury shall find the defendant guilty if the Commonwealth failed to prove each element beyond a reasonable doubt to be structural error).

In *Ross v. Oklahoma*, 487 U.S. 81, 88-91 (1988), the United States Supreme Court held that, although a trial court had erred in failing to dismiss a potential juror for cause, the error was harmless because the defendant was able to use a peremptory challenge to rectify the error. The Court noted that the Sixth Amendment requires that an impartial jury be seated, but recognized that "peremptory challenges are not of constitutional dimension" because they are a means to achieving the constitutionally required impartial jury. *Id.* at 88. The Court held that, although the trial court's error required Ross to use one of his peremptory challenges to ensure an impartial jury was

seated, Ross was not deprived "of an impartial jury or of any interest provided by the state." *Id.* at 91. Thus, the Court holds that the loss of a peremptory challenge is not a "structural error."

In asserting claim III(B), Morrisette relies solely on his argument that prejudice should be presumed. Morrisette has not attempted to demonstrate that the resulting jury was impartial. Thus, the Court further holds that Morrisette has failed to demonstrate a reasonable probability that, but for counsel's failure to object to the trial court's qualification of a panel of 22 jurors and counsel's failure to demand a fifth peremptory strike, the outcome of the proceeding would have been different. *See Strickland*, 466 U.S. at 687.

4. Failure to Present Evidence

In claim IV, Morrisette alleges he was denied the effective assistance of counsel because counsel failed to present evidence that Morrisette and the victim, Dorothy White, had been having "an affair." Relying on affidavits by Patricia Walton, Morrisette's ex-wife; and Randy Rodgers, Morrisette's former employer; Morrisette alleges that counsel should have presented testimony from Walton and Rodgers to show that Morrisette and White had consensual sex at the time of the murder. Despite his defense that he did not commit the murder, Morrisette asserts that, if counsel had presented the testimony of both Walton and Rodgers, the jury would have either acquitted him or convicted him of first-degree murder.

In the affidavits presented by Morrisette, Walton states that Morrisette's mother was afraid that Bill Anthony, who had a relationship with White, was going to

hurt Morrisette because Morrisette was also involved in a sexual relationship with White. Walton also states that she saw Morrisette and White together. Rodgers asserts that he could have corroborated the fact that Morrisette had an affair with White because Rodgers had seen Morrisette and White together and because Morrisette told Rodgers that he had slept with White. Rodgers further stated that Morrisette was afraid of Bill Anthony.

Morrisette argues that, if the jury believed he and White had engaged in consensual sex, it would not have convicted Morrisette of capital murder, even if the jury believed he killed her. Morrisette further argues that, if the jury had heard evidence of Bill Anthony's motive to commit the murder, Morrisette would have been acquitted.

Not only do these affidavits contain inadmissible, hearsay testimony, they present evidence that is inconsistent with Morrisette's defense at trial. A few days after the crime was committed, Morrisette told the police he only knew White because he once went to her house with Bill Anthony. Morrisette also gave the police a false alibi for the night of the murder. However, in his 1999 interview with the police, Morrisette denied knowing White and denied having sexual intercourse with her. Thus, it would have been unreasonable for counsel to attempt to assert a defense that Morrisette and White had consensual sexual intercourse because Morrisette asserted an alibi defense and previously stated that he did not know White. A defense based on the affidavits would emphasize that Morrisette lied twice to the police in order to conceal his guilt. Therefore, Morrisette has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error,

the outcome of the proceeding would have been different. *See Strickland*, 466 U.S. at 687.

5. Failure to Request a Jury Instruction on First-Degree Murder

In claim V(B), Morrisette alleges he was denied the effective assistance of counsel because counsel failed to request an instruction on the lesser-included offense of first-degree murder. Morrisette alleges he was prejudiced by counsel's failure because the jury could have found that the evidence was either insufficient to prove Morrisette's sexual* intercourse with White was nonconsensual or insufficient to prove that the act of sexual intercourse was contemporaneous with the killing of White. Morrisette bases this argument on the evidence that there was no injury to the victim's external genitalia coupled with the presence of his semen.

The defense's theory at trial was that Morrisette did not murder White. Counsel argued during trial that Morrisette "was not involved in the murder" and that "[n]othing in any evidence shows that William Morrisette did the murder." Counsel could not have reasonably argued that Morrisette committed first-degree murder without destroying the stronger argument that Morrisette did not commit the murder. Therefore, Morrisette has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the outcome of the proceeding would have been different. *See Strickland*, 466 U.S. at 687.

6. Cumulative Nature of Counsel's Errors

In claim VIII, Morrisette asserts the cumulative effect of trial counsel's deficient performance prejudiced him. This claim has no merit. "Having rejected each of petitioner's individual claims, there is no support for the proposition that such actions when considered collectively have deprived petitioner of his constitutional right to effective assistance of counsel." *Lenz v. Warden*, 267 Va. 318, 340, 593 S.E.2d 292, 305 (2004).

7. Failure to Conduct Post-Trial Juror Interviews

In claim XI(A)(2), Morrisette contends that counsel should have interviewed the jurors immediately following the trial and that, if counsel had done so, the interviews would have disclosed the jurors' failure to follow the trial court's instructions regarding Morrisette's decision not to testify. Morrisette asserts he was prejudiced by this failure because it prevented counsel from raising the issue of the jury's misconduct in a post-trial motion and on appeal.

There is no requirement that counsel must interview every juror at the end of a case. *Lenz*, 267 Va. at 326, 593 S.E.2d at 296-97. Thus, Morrisette has failed to demonstrate that counsel's performance was deficient. *See Strickland*, 466 U.S. at 687.

II. PENALTY PHASE ISSUES

In claim X, Morrisette maintains that his trial counsel were ineffective during the penalty phase of his trial for failing to object to a verdict form that, according to Morrisette, was defective and did not conform to the jury

instructions and the law. The single verdict form provided to the jury during the penalty phase of Morrisette's trial contained the following sentencing options:[4]

> _____ We, the Jury, in the case of Commonwealth v. William Wilton Morrisette, III, having found the defendant guilty of capital murder, and having found after consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society,
>
> and
>
> having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved torture; depravity of mind; or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.
>
> _____
> FOREPERSON
>
> OR
>
> _____ We, the Jury, in the case of Commonwealth v. William Wilton Morrisette, III, having found the defendant guilty of capital murder and having

[4] In 2003, after this Court's decision in *Powell v. Commonwealth*, 261 Va. 512, 552 S.E.2d 344 (2001), the General Assembly amended Code § 19.2-264.4(D)(2) to add the option of a life sentence and a monetary fine. See Acts 2003, chs. 1031 and 1040. Even though the amendment occurred after Morrisette's trial, the verdict form used in his sentencing proceeding included this option, which was consistent with the provisions of Code § 18.2-10 (monetary limits of fine for conviction of felony).

unanimously found after consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

_____

FOREPERSON

OR

_____ We, the Jury, in the case of Commonwealth v. William Wilton Morrisette, III, having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved torture; depravity of mind; or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

_____

FOREPERSON

OR

_____ We, the Jury, in the case of Commonwealth v. William Wilton Morrisette, III, having found the defendant guilty of capital murder and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

_____

FOREPERSON

OR

_____ We, the Jury, in the case of Commonwealth v. William Wilton Morrisette, III, having found the defendant guilty of capital murder and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life and a fine of $_____ (fine must not be more than $100,000.00).

_____
FOREPERSON

Morrisette contends that the verdict form was defective in two respects. Relying on this Court's decision in *Atkins v. Commonwealth*, 257 Va. 160, 510 S.E.2d 445 (1999), Morrisette first contends that the verdict form did not comport with the trial court's jury instructions because it failed to include an option requiring the jury to fix his sentence at life imprisonment if it found that the Commonwealth had proven neither aggravating factor beyond a reasonable doubt. Second, Morrisette argues that, based on this Court's decision in *Powell v. Commonwealth*, 261 Va. 512, 552 S.E.2d 344 (2001), the verdict form failed to give the jury the option of imposing a life sentence even if the jury found that the Commonwealth had proven one or both aggravating factors beyond a reasonable doubt.

Morrisette's first argument is without merit. As the Warden asserts, our decision in *Lenz* resolves Morrisette's contention that, based on the *Atkins* decision, the verdict form was defective because it failed to include an option requiring the jury to impose a life sentence if the Commonwealth proved neither aggravating factor beyond a reasonable doubt. In *Lenz*, we stated that, if the trial court in *Atkins* had used the statutory verdict form, *see* Code § 19.2-264.4(D)(2), the "missing sentencing option would have been submitted to the jury." 267 Va. at 324, 593

S.E.2d at 295. As in *Lenz*, the verdict form given to the jury in Morrisette's sentencing proceeding included the language set out in Code § 19.2-264.4(D)(2), which is the sentencing option that was missing in *Atkins*. *Atkins*, 257 Va. at 179, 510 S.E.2d at 457. Thus, the verdict form in this case did not fail to include the option requiring the imposition of a life sentence with or without a fine if the Commonwealth proved neither aggravating factor beyond a reasonable doubt.

As to Morrisette's second argument, the Warden asserts that the verdict form used in Morrisette's sentencing proceeding is the one mandated by the provisions of Code § 19.2-264.4(D), that it is an accurate and complete statement of the law, and that trial counsel thus could not have been ineffective for failing to object to its use during the sentencing phase of Morrisette's trial. Continuing, the Warden contends that this Court did not invalidate the statutory verdict form in *Powell*; that this Court, before *Powell*, as well as the Supreme Court of the United States, has upheld the use of the statutory verdict form and the parallel jury instructions; and that the General Assembly, in post-*Powell* legislation, has rejected any changes in the statutory verdict form suggested by our decision in *Powell*.

The defendant in *Powell* argued that, during the penalty phase, the trial court erred in giving the jury verdict forms that did not "expressly state [ ] the jury's option of imposing a life sentence or a life sentence and a fine where the jury found one or both of the aggravating factors to be present."[6]

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[6] The following four separate verdict forms were used in Powell's sentencing proceeding:

[Powell Verdict Form 1]

> We, the jury, on the issue joined, having found the defendant guilty of Capital Murder in the Commission of Rape

(Continued on following page)

and having unanimously found after consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society,

and having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

FOREMAN

[Powell Verdict Form 2]

We, the jury, on the issue joined, having found the defendant guilty of Capital Murder in the Commission of Rape and having unanimously found after consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

FOREMAN

[Powell Verdict Form 3]

We, the jury, on the issue joined, having found the defendant guilty of Capital Murder in the Commission of Rape and having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

FOREMAN

[Powell Verdict Form 4]

We, the jury, on the issue joined, having found the defendant guilty of Capital Murder in the Commission of Rape and having considered all of the evidence in aggravation

(Continued on following page)

261 Va. at 542, 552 S.E.2d at 361. In response, the Commonwealth asserted that the verdict forms comported with the provisions of Code § 19.2-264.4(D) and that, based on our decision in *Roach*, the trial court did not err by refusing to substitute an alternative form for the statutory form. *Powell*, 261 Va. at 542-43, 552 S.E.2d at 362.

Disagreeing with the Commonwealth, we framed the issue as

> whether the jury [was] likely to be confused where it [was] instructed that it may impose a sentence other than death if it [found] one or both of the aggravating factors have been proven beyond a reasonable doubt, but receive[d] verdict forms that [did] not expressly state that the jury [was] allowed to fix a sentence of life imprisonment even though one or both aggravating factors [were] present.

Id. at 545, 552 S.E.2d at 363. We concluded that a defendant is entitled to a verdict form "that accurately and expressly correspond[s] to the trial court's sentencing instruction" and that in the penalty phase of a capital murder trial, the trial court must give the jury a verdict form that expressly includes the option for imposing a life sentence or a life sentence and a fine of not more than $100,000 when the jury finds that the Commonwealth has proven one or both aggravating factors beyond a reasonable doubt. *Id.*

Nevertheless, the Warden contends that the holding in *Powell* was dictum and contrary to our prior decisions

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and mitigation of such offense, fix his punishment at imprisonment for life.

FOREMAN

in *Mueller v. Commonwealth*, 244 Va. 386, 422 S.E.2d 380 (1992), and *Roach*. The defendants in both of those cases challenged the verdict form used in the respective penalty phase proceedings of their capital murder trials. We found no error in both instances.

Specifically, the defendant in *Mueller* claimed that the verdict form "did not properly inform [the jury] of the sentencing options" and "influenced the jury to impose the death sentence rather than life imprisonment." 244 Va. at 412, 422 S.E.2d at 396. On brief, the defendant argued that "[i]t would be ludicrous to say that we instructed the jury that it could find aggravating factors and still give a life sentence when the form the jury fills out does not make it appear that this option exists."

The verdict form used in Mueller's sentencing proceeding gave the jury four sentencing options: (1) a sentence of death based on a finding of both aggravating factors; (2) a sentence of death based on a finding of future dangerousness; (3) a sentence of death based on a finding of vileness; and (4) a life sentence based on all of the evidence in aggravation and mitigation of the offense. *Id.* In addition to the verdict form, the trial court instructed the jury that it could not impose the death penalty unless the Commonwealth proved beyond a reasonable doubt at least one of the aggravating factors and that, even if the Commonwealth did so, the jury was still free to fix the defendant's sentence at life imprisonment. *Id.* at 412, 422 S.E.2d at 396-97. We concluded the verdict form, in conjunction with the jury instructions, "fully apprised the jury of its sentencing options," did not favor any particular option, and was complete. *Id.* at 413, 422 S.E.2d at 396-97. While we did not specifically address the provisions of

Code § 19.2-264.4(D), the verdict form used in *Mueller* followed the statutory form in effect at that time.[6]

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[6] The following verdict form was provided to the jury in *Mueller*:

ALTERNATIVE JURY VERDICTS

Cross out any paragraph, word or phrase which you do not find beyond a reasonable doubt

We, the jury, on the issue joined, having found the defendant guilty of capital murder during the commission of rape and abduction with the intent to defile, and having unanimously found after consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society,

and

having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind, or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

_____

FOREMAN

OR

We, the jury, on the issue joined, having found the defendant guilty of capital murder during the commission of rape and abduction with the intent to defile, and having unanimously found after consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

_____

FOREMAN

OR

We, the jury, on the issue joined, having found the defendant guilty of capital murder during the commission of rape and abduction with the intent to defile, and having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind, or aggravated battery to the victim beyond the minimum necessary to accomplish the

(Continued on following page)

Similarly, in *Roach*, the defendant argued on brief that the statutory verdict form that the trial court gave the jury was "constitutionally defective" because "the jury never actually received a verdict form option to sentence Roach to life in prison if, despite proof of future dangerousness after weighing this mitigation evidence, fairness and mercy justified this result."[7] Roach further asserted that the trial court erred by refusing to give the jury his proposed verdict form that included the specific option allowing the jury to impose a life sentence even if it found that the Commonwealth had proven "future dangerousness" beyond a reasonable doubt. We rejected Roach's arguments. Based on our decisions in *Stockton v. Commonwealth*, 241 Va. 192, 215, 402 S.E.2d 196, 209 (1991), and *LeVasseur v. Commonwealth*, 225 Va. 564, 594-95, 304 S.E.2d 644, 661 (1983), we concluded that we had already decided the issue presented.[8] *Roach*, 251 Va. at 336, 468 S.E.2d at 105. We

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act of murder, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

FOREMAN

OR

We, the jury, on the issue joined, having found the defendant guilty of capital murder during the commission of rape and abduction with the intent to defile, and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

FOREMAN

[7] In the penalty phase of Roach's trial, the trial court submitted only the "future dangerousness" predicate to the jury. *Roach*, 251 Va. at 329, 468 S.E.2d at 101.

[8] In *Stockton*, we rejected the argument that the "verdict form prescribed by Code § 19.2-264.4(D) and used by the trial court" discouraged the jury from giving proper consideration to mitigating evidence. 241 Va. at 215, 402 S.E.2d at 209. In *LeVasseur*, the instructions given to

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further held that the trial court did not err by refusing "to substitute Roach's proposed verdict form for the statutory sentencing verdict form."[9] *Id.*

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the jury during the penalty phase were at issue, not the verdict form. We held that the defendant was not entitled to jury instructions that singled out certain mitigating evidence. 225 Va. at 595, 304 S.E.2d at 661.

[9] The verdict form given to the jury in *Roach* provided the jury with the following sentencing options:

> We, the jury, on the issue joined, having found the Defendant, guilty of the willful, deliberate, and premeditated killing of a person in the commission of robbery while armed with a deadly weapon, and having unanimously found after consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.
>
> _____
> Foreperson
>
> or
>
> We, the jury, on the issue joined, having found the Defendant, guilty of the willful, deliberate, and premeditated killing of a person in the commission of robbery while armed with a deadly weapon, and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.
>
> _____
> Foreperson
>
> or
>
> We, the jury, on the issue joined, having found the Defendant, guilty of the willful, deliberate, and premeditated killing of a person in the commission of robbery while armed with a deadly weapon, and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life and a fine of $_____ (fine must not be more than $100,000.00).
>
> _____
> Foreperson

While the verdict forms used in *Powell*, *Mueller*, and *Roach* followed the statutory form set out in Code § 19.2-264.4(D), the challenges to the verdict forms in *Mueller* and *Roach* did not include an express argument premised on the notion that the sentencing options set forth in a verdict form must explicitly correspond to the trial court's sentencing instructions. That rationale, which we utilized in *Atkins* and *Powell*, "flows from the principle that 'it is materially vital to the defendant in a criminal case that the jury have a proper verdict form.'" *Powell*, 261 Va. at 545, 552 S.E.2d at 363 (quoting *Atkins*, 257 Va. at 178, 510 S.E.2d at 456). Thus, we were addressing a new issue in *Powell*, 261 Va. at 542, 552 S.E.2d at 361. We take this opportunity to reaffirm our holding in *Powell* and, to the extent, if any, that our holdings in *Mueller* and *Roach* are inconsistent with *Powell*, we overrule those decisions.

Turning to the merits of Morrisette's claim, we find that the verdict form used in Morrisette's sentencing proceeding omitted the same sentencing option as the verdict form at issue in *Powell*. Both failed to include express language telling the jury that it may impose a life sentence with or without a fine even if it concluded that the Commonwealth had proven either or both aggravating factors beyond a reasonable doubt. That conclusion, however, does not end our inquiry.

Because Morrisette is claiming counsel was ineffective for failing to object to the use of the defective verdict form, we must determine whether counsel's failure was unreasonable and, if so, whether counsel's error undermines the Court's confidence in the outcome of the proceeding. As to the "performance" prong of the *Strickland* test, we hold that the representation provided to Morrisette by his trial counsel "fell below an objective standard of reasonableness."

Strickland, 466 U.S. at 688. This Court issued its decision in *Powell* approximately two months before the commencement of Morrisette's trial. We succinctly stated our holding in *Powell*: "in a capital murder . . . trial, the trial court must give the jury verdict forms providing expressly for the imposition of a sentence of imprisonment for life and a fine of not more than $100,000 when the jury finds that one or both of the aggravating factors have been proven beyond a reasonable doubt." 261 Va. at 545, 552 S.E.2d at 363. In light of that holding, any reasonably competent attorney would have known that it was imperative that he or she object to a verdict form that did not expressly include that sentencing option. *See Green*, 264 Va. at 609, 571 S.E.2d at 138 (reasonably competent attorney would have objected to a jury instruction that was clearly erroneous and violated the procedural safeguard requiring the prosecution to prove every element of the charged offense beyond a reasonable doubt).

We also find that trial counsel's deficient performance prejudiced Morrisette's defense.[10] In both *Atkins* and *Powell*, we recognized that a jury is likely to be confused when there is a conflict between the sentencing instructions and the verdict form. The conflict in this case existed because the jury was instructed that it could sentence Morrisette to life imprisonment with or without a fine even if it found that the Commonwealth had proven one or both aggravating factors beyond a reasonable doubt. However, the verdict form did not contain a separate paragraph expressly stating that sentencing option.

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[10] We reject Morrisette's argument that the omission in the verdict form constitutes a "structural error" not subject to the prejudice analysis. *See Emmett*, 269 Va. at 171, 609 S.E.2d at 607.

Thus, we conclude that "there is a reasonable probability that, but for counsel's . . . error[in failing to object to the incomplete verdict form], the result of the proceeding would have been different," *i.e.*, the jury would not have imposed the death penalty.[11] *Strickland*, 466 U.S. at 694. The implicit jury confusion caused by the conflict between the instructions and the verdict form was "sufficient to undermine confidence in the outcome." *Id.*

For these reasons, a limited grant of the writ of habeas corpus shall issue to remand the matter to the Circuit Court for the City of Hampton for a new sentencing hearing.[12]

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[11] In contrast to the Court's holding today, we held in *Emmett* that the petitioner had failed to demonstrate that there was a "'reasonable probability'" that, but for trial counsel's failure to object to an incomplete verdict form, "'the result of the proceeding would have been different.'" 269 Va. at 171, 609 S.E.2d at 607 (quoting *Strickland*, 466 U.S. at 694). The omission in the verdict form there was different than the one at issue in Morrisette's petition for writ of habeas corpus. The verdict form used in the penalty phase of Emmett's capital murder trial omitted only the provisions of Code § 19.2-264.4(D)(2). However, "[b]ecause the jury found that the Commonwealth had proven both aggravating factors beyond a reasonable doubt, it had no reason or occasion to consider the option of a life sentence with or without a fine mandated when the Commonwealth proves neither aggravating factor." *Emmett*, 296 Va. at 171, 609 S.E.2d at 607. Thus, we concluded that Emmett had suffered no prejudice.

[12] Because the Court concludes that Morrisette is entitled to a new sentencing hearing, it is not necessary to consider the remaining penalty phase claims. In addition, Morrisette has withdrawn claims XIII (protocol for lethal injection violates the United States and Virginia constitutional prohibitions against cruel and unusual punishment) and XIV (execution by electrocution violates the United States and Virginia constitutional prohibitions against cruel and unusual punishment).

Justice KINSER, with whom Justice LEMONS and JUSTICE AGEE join, concurring in part and dissenting in part:

I respectfully disagree with the majority's decision to issue a limited grant of the writ of habeas corpus to remand the matter to the circuit court for a new sentencing hearing. In my view, the petitioner, William Wilton Morrisette, III, has not satisfied the "prejudice" prong of the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In other words, Morrisette has not shown that his trial counsel's alleged error in failing to object to the verdict form at issue was "so serious as to deprive [him] of a fair trial." *Id.*

In deciding a claim of ineffective assistance of counsel, it is often easier to dispose of the claim by proceeding directly to the question whether the petitioner suffered any prejudice as a result of counsel's alleged deficiencies. *Id.* at 697. If a petitioner makes "an insufficient showing on one [component of the inquiry]," it is not necessary to address both prongs of the *Strickland* test. *Id.* I find that to be true in this case. Thus, I follow that course and address only the prejudice prong.

In order to establish that counsel's alleged deficiency prejudiced his defense, Morrisette has to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 696. Counsel's alleged error in this case

must have been so serious "as to deprive [Morrisette] of a fair trial, a trial whose result is reliable." *Id.* at 687.

> [T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated.

United States v. Cronic, 466 U.S. 648, 658 (1984); *accord Lockhart v. Fretwell*, 506 U.S. 364, 368 (1993).

Morrisette challenges the verdict form used in the penalty phase of his trial on the basis that it did not include an express option allowing the imposition of a life sentence with or without a fine even if the jury found that the Commonwealth had proven one or both aggravating factors beyond a reasonable doubt. This challenge focuses on an alleged *omission* in the verdict form. Morrisette does not claim that the verdict form contained an *erroneous* statement of law as to the jury's sentencing options. *See Henderson v. Kibbe*, 431 U.S. 145, 155 (1977) ("[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law").

In assessing whether Morrisette was prejudiced by this omission, the verdict form should not be looked at in isolation but rather as part of the overall instructions given to the jury during the penalty proceeding. *See Boyde v. California*, 494 U.S. 370, 378 (1990) (a jury instruction should not be viewed in isolation but should be examined in the context of the entire charge to the jury). Furthermore, in *Atkins v. Commonwealth*, 257 Va. 160, 177 n.8, 510 S.E.2d 445, 456 n.8 (1999), we stated that, in the

context presented there, "the term 'instruction' is sufficiently broad to cover any statement of the law given by the trial court to the jury, which would necessarily include the written verdict form required by Code § 19.2-264.4(D)."

Looking not just at the verdict form but also at the jury instructions, I find crucial in applying the *Strickland* prejudicial analysis to Morrisette's claim the fact that the trial court correctly instructed the jury about all of its sentencing options and Morrisette does not claim otherwise. That instruction stated:

> You have convicted the defendant of an offense which may be punishable by death. You must decide whether the defendant shall be sentenced to death or to imprisonment for life and a fine of a specific amount, but not more than $100,000.00. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following aggravating circumstances:
>
> (1) That, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or
>
> (2) That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.
>
> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt either of these circumstances, then you

may fix the punishment of the defendant at death. But if you nevertheless believe from all the evidence, including evidence in mitigation, that the death penalty is not justified, then you shall fix the punishment of the defendant at:

(1) Imprisonment for life; or

(2) Imprisonment for life and a fine of a specific amount, but not more than $100,000.00.

If the Commonwealth has failed to prove beyond a reasonable doubt at least one of these circumstances, then you shall fix the punishment at:

(1) Imprisonment for life; or

(2) Imprisonment for life and a fine of a specific amount, but not more than $100,000.00.

Any decision you make regarding punishment must be unanimous.

Armed with this correct statement of law along with the penalty phase verdict form, a reasonable jury could not have misunderstood its sentencing options. *See Francis v. Franklin*, 471 U.S. 307, 315 (1985) ("'whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction'") (quoting *Sandstrom v. Montana*, 442 U.S. 510, 514 (1979)). In other words, there is not a reasonable probability that the jury would have voted to impose a life sentence or a life sentence with a fine after finding both aggravating factors but failed to do so because the verdict form did not expressly set out an option with that particular language. The jury was clearly instructed

that, if it found the Commonwealth had proven either of the aggravating factors beyond a reasonable doubt, it "may" fix punishment at death; but that, if it nevertheless believed from all the evidence, including evidence in mitigation, the death penalty was not justified, it "shall fix" punishment at life imprisonment or life imprisonment and a fine. This language juxtaposed with the verdict form that expressly, in a separate paragraph, provided the option of fixing punishment at life imprisonment or life imprisonment and a fine "after having considered all of the evidence in aggravation and mitigation" was not confusing. Nor was there a conflict between the verdict form and the trial court's instructions.

In short, the jury was instructed that, even if it found one or both aggravating factors, it could sentence Morrisette to life imprisonment or life imprisonment and a fine if it believed, after considering all the evidence including mitigation evidence, that the death penalty was not justified. The final two paragraphs of the verdict form provided the jury with the means to effect such a finding, but the jury instead chose to fix Morrisette's sentence at death.

Thus, I conclude that Morrisette has not carried his burden of demonstrating that counsel's alleged error was "so serious as to deprive [him] of a fair trial." *Strickland*, 466 U.S. at 687; *cf. Henderson*, 431 U.S. at 154 (burden of showing that an erroneous instruction was so prejudicial as to support collateral attack on defendant's conviction is greater than burden to show plain error on direct appeal); *Jenkins v. Commonwealth*, 254 Va. 333, 336 n.4, 492 S.E.2d 131, 132 n.4 (1997) (noting different standard for collateral review of constitutional error). The result of

Morrisette's sentencing proceeding was not unreliable. *See Strickland*, 466 U.S. at 696.

For these reasons, I respectfully concur, in part, and dissent, in part, and would dismiss Morrisette's petition for writ of habeas corpus.

This order shall be published in the Virginia Reports.

The Clerk of this Court shall certify copies of this order to counsel for the petitioner, to the respondent, to the Clerk of the Circuit Court of the City of Hampton, and to the Attorney General of Virginia, which certification shall have the same force and effect as if a writ of habeas corpus were formally issued and served.

A Copy,

Teste:

Patricia L. Harrington, Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond, on Friday, the 23rd day of September, 2005.

William Wilton Morrisette, III, Petitioner,

against Record No. 040275

Warden of the Sussex I State Prison, Respondent.

Upon a Petition for Rehearing

On consideration of the petition of the respondent to set aside the judgement rendered herein on the 3rd day of June, 2005 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: *Original order signed by a deputy clerk of the Supreme Court of Virginia at the direction of the Court*

Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond, on Thursday *the* 3rd *day of* November, 2005.

William Wilton Morrisette, III, Petitioner,

against Record No. 040275

Warden of the Sussex I State Prison, Respondent.

Upon a Petition for a Writ of Habeas Corpus

On October 5, 2005 came the respondent, by the Attorney General of Virginia, and filed a motion to stay this Court's June 3, 2005 order pending the timely filing and disposition of a petition for certiorari to the Supreme Court of the United States.

Upon consideration whereof, the court grants the motion.

A Copy,

Teste:

/s/ Patricia L. Harrington

Clerk

WILLIAM WILTON MORRISETTE, III v. COMMONWEALTH OF VIRGINIA

Record Nos. 020323 & 020324

SUPREME COURT OF VIRGINIA

264 Va. 386; 569 S.E.2d 47; 2002 Va. LEXIS 100

September 13, 2002, Decided

COUNSEL: George M. Rogers, III, Stephen J. Weisbrod (Weisbrod & Phillips, on brief), for appellant.

Pamela Rumpz, Assistant Attorney General (Jerry W. Kilgore, Attorney General, on brief), for appellee.

JUDGES: OPINION BY JUSTICE CYNTHIA D. KINSER.

OPINION BY: CYNTHIA D. KINSER

OPINION: Present: All the Justices.

A jury convicted William Wilton Morrisette, III, of the 1980 rape and capital murder of Dorothy M. White. At the conclusion of the penalty phase of a bifurcated trial, the jury fixed Morrisette's punishment at death on the capital murder charge and at life imprisonment on the rape charge. The jury based its sentence of death on findings of both "future dangerousness" and "vileness." *See* Code § 19.2-264.2. The trial court sentenced Morrisette in accordance with the jury verdict.

We have consolidated the automatic review of Morrisette's death sentence with his appeal of the capital murder conviction. Code § 17.1-313(F). We have also certified Morrisette's appeal of his rape conviction from the Court of Appeals and consolidated that appeal with the appeal of the capital murder conviction. Code § 17.1-409.

After considering the issues raised in Morrisette's assignments of error and conducting our mandated review pursuant to Code § 17.1-313(C), we find no error in the judgments of the Circuit Court. Accordingly, we will affirm Morrisette's convictions for rape and capital murder, in violation of Code §§ 18.2-61 and 18.2-31(5), respectively, and his sentence of death.

I. FACTS

In accordance with well-established principles, we state the evidence in the light most favorable to the Commonwealth, the prevailing party at trial. *Bell v. Commonwealth*, 264 Va. 172, 178, 563 S.E.2d 695, 701 (2002) (citing *Burns v. Commonwealth*, 261 Va. 307, 313, 541 S.E.2d 872, 877, *cert. denied*, 151 L. Ed. 2d 542, ___ U.S. ___, 122 S. Ct. 621 (2001); *Jackson v. Commonwealth*, 255 Va. 625, 632, 499 S.E.2d 538, 543 (1998), *cert. denied*, 525 U.S. 1067, 142 L. Ed. 2d 658, 119 S. Ct. 796 (1999); *Roach v. Commonwealth*, 251 Va. 324, 329, 468 S.E.2d 98, 101, *cert. denied*, 519 U.S. 951, 117 S. Ct. 365, 136 L. Ed. 2d 256 (1996)). We also accord the Commonwealth the benefit of all inferences fairly deducible from the evidence. *Id.* (citing *Higginbotham v. Commonwealth*, 216 Va. 349, 352, 218 S.E.2d 534, 537 (1975)).

A. GUILT PHASE

When Dorothy White did not report for work on the morning of July 25, 1980, two of her co-workers became concerned and went to her house trailer, located on Pine Needle Road in the City of Hampton, to check on her welfare. Upon entering the trailer, they found White's body lying on the kitchen floor. Her blouse and bra were pulled

up, exposing her breasts; she was otherwise nude. Her throat had been cut, and she had sustained several other wounds. A "milky-looking substance [that] appeared to be wet" was visible on her pubic hair. The kitchen was splattered with blood, but there were no signs of a struggle in any other portion of White's home nor any evidence of a forced entry into the dwelling.

An autopsy was performed the next day, during which samples of White's hair, blood, and body fluids were collected from her body by using a Physical Evidence Recovery Kit (PERK). Testing of those samples revealed the presence of intact sperm on the swabs taken from White's vulva, vagina, and cervix; only a sperm head was found on the anal swab. The autopsy documented that White had suffered a slash wound across her throat, which totally severed her trachea, the right carotid artery, the jugular vein, and certain muscles in her neck; the wound partially severed the esophagus. White had also sustained a stab wound to her neck; three stab wounds to her chest, one of which penetrated her heart; and stab wounds to her abdomen and flank, for a total of eight stab wounds. Additional defensive wounds on her hands and legs indicated that White had attempted to ward away the knife blows.

Several of the wounds individually could have caused White's death, but the slash wound to her throat was "fatal within minutes." However, despite the lethal nature of that wound, it did not render White instantly unconscious. Dr. Faruk B. Presswalla, the forensic pathologist who performed the autopsy, testified that because the trachea, or windpipe, was cut, much of the flowing blood traveled down that airway. He described the effect as "sort of like drowning in your own blood." The time of death was

estimated at approximately 11:30 p.m. on the night before White's co-workers discovered her body.

In the days following the murder, police officers interviewed several individuals as possible suspects, including Morrisette. Morrisette acknowledged that he knew White through his employer, Albert "Bill" Anthony, who was White's "boyfriend," and that he had previously washed White's automobile when she brought it to Anthony's "car lot." Morrisette had also accompanied Anthony to White's residence on two occasions, once to perform yard work and the second time to pick up a stereo. When Morrisette was questioned concerning his whereabouts on the night in question, he stated that he had gone to Fertitta's Restaurant, where he had consumed hot dogs and beer. He stated that after eating, he walked to the Grandview Fishing Pier, talked with several people who were fishing, and drank another beer. According to Morrisette, he then went to the Circle Inn around 10:00 p.m. and stayed there until 2:00 a.m. the following morning. He told the police that, although his sister lived in an apartment above the Circle Inn, he did not go to her apartment when he left the Circle Inn, but instead slept in an old Dodge pick-up truck in the parking lot of the Circle Inn. He said that he awoke around 9:00 or 10:00 a.m. the next morning, returned to the Circle Inn, and drank with a person who lived in a trailer park across the street from the Circle Inn.

The murder investigation became stalled, and no one was charged with the crime until 19 years later, when a DNA profile extracted from sperm retrieved from the cervix and vulva swabs of White's body was entered into

the Virginia Forensic Laboratory's DNA databank.[1] A search in the databank revealed that Morrisette's DNA profile[2] was a "cold hit" match with the DNA profile recovered in the PERK samples taken from White. As a result, a search warrant was obtained for a sample of Morrisette's blood, and additional testing using that sample confirmed that the DNA profile extracted from the sperm recovered from the victim was consistent with Morrisette's DNA profile.[3] According to David A. Pomposini, who testified at trial as an expert in the field of forensic biology, the probability of randomly selecting an unrelated individual other than Morrisette with a DNA profile matching the DNA profile of the sperm recovered from the cervix swabs of the victim is one in 900 million in the Caucasian population, one in 1.2 billion in the Black population, and one in 800 million in the Hispanic population.[4]

B. PENALTY PHASE

In the penalty phase of the trial, the Commonwealth introduced photographs of the victim as evidence of the vileness of the murder. The Commonwealth also argued that Morrisette was a future danger to society, introducing

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[1] In a training session concerning the DNA databank, the Hampton Police Department had been asked to submit "cold cases" for retesting.

[2] The record does not reflect when Morrisette's DNA profile was put into the Virginia Forensic Laboratory's DNA databank. However, on brief, Morrisette states that his DNA profile was entered in connection with his convictions on charges of abduction and maiming in 1986.

[3] Arrest warrants charging Morrisette with rape and first degree murder were obtained simultaneously with the search warrant. A grand jury subsequently indicted Morrisette for rape and capital murder.

[4] Morrisette is a member of the Caucasian population.

evidence of his previous convictions for abduction and maiming in 1986, for burglary in 1984, and for driving under the influence of alcohol in 1999.

The victim of the prior abduction and maiming testified that Morrisette had attacked her as she sat in a car parked outside a high school, waiting for her daughter to emerge from band practice. He had a knife and pushed her down onto the car seat, trying to gag her. Morrisette cut her jawbone and neck, fleeing only when other vehicles approached.

In mitigation, Morrisette and the Commonwealth stipulated that, according to a deputy at the regional jail where Morrisette had been incarcerated prior to trial, Morrisette was a model inmate with a positive attitude. Morrisette's daughter and sister testified as to his affection for his family.[5]

II. ANALYSIS

A. PRE-TRIAL AND TRIAL ISSUES

1. SPEEDY TRIAL

Morrisette claims that the delay between the time of the offense in 1980 and his arrest in August 1999 violated his due process rights under both the Constitution of the United States and the Constitution of Virginia. In the statement that Morrisette gave to the police shortly after the murder, he provided details concerning his whereabouts on the evening in question, including names, addresses, and telephone numbers of putative corroborating witnesses.

[5] We will summarize additional facts and material proceedings when necessary to address specific issues raised on appeal.

Testimony at trial established that the police never made any attempt to confirm Morrisette's alleged alibi after he provided that information. Morrisette asserts that, as a result of the pre-indictment delay, he was unable to locate the people who could have corroborated his version of his activities on the evening when White was murdered.

To buttress his claim of prejudice because of the pre-indictment delay, Morrisette also relies on the fact that, in 1985, White's PERK samples were resubmitted to the forensic laboratory for testing against Morrisette's PERK samples collected in connection with the abduction and maiming charges. However, Morrisette's PERK was never submitted to the laboratory, and the Hampton Police Department eventually directed that White's PERK be returned without any additional testing.

In denying Morrisette's motion to dismiss the indictments because of the pre-indictment delay, the trial court concluded that both the Commonwealth and Morrisette had probably experienced some actual prejudice because of the death of witnesses since White's murder. However, the court determined that a defendant has the burden to establish that the delay was intentional and used by the Commonwealth to gain a tactical advantage, and concluded that Morrisette had not carried that burden in this case. We agree with the trial court's conclusions.

It is important at the outset to point out that the type of delay about which Morrisette complains is pre-indictment delay, not post-indictment delay. Thus, the Speedy Trial Clause of the Sixth Amendment is inapplicable. *United States v. Lovasco*, 431 U.S. 783, 788-89, 52 L. Ed. 2d 752, 97 S. Ct. 2044 (1977); *Hall v. Commonwealth*, 8 Va. App. 526, 528-29, 383 S.E.2d 18, 20 (1989).

Instead, the Due Process Clause is the source of constitutional protection against oppressive pre-indictment delay, but even that clause has a limited role to play in such situations. *Lovasco*, 431 U.S. at 789.

"[P]roof of prejudice is generally a necessary but not sufficient element of a due process claim, and . . . the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." *Id.* at 790 (citing *United States v. Marion*, 404 U.S. 307, 324-25, 30 L. Ed. 2d 468, 92 S. Ct. 455 (1971)). Thus, to gain dismissal of criminal charges because of pre-arrest or pre-indictment delay, a defendant must establish that "(1) the prosecutor intentionally delayed indicting [the defendant] to gain a tactical advantage and (2) the defendant incurred actual prejudice as a result of the delay." *United States v. Amuny*, 767 F.2d 1113, 1119 (5th Cir. 1985); *accord United States v. Gouveia*, 467 U.S. 180, 192, 81 L. Ed. 2d 146, 104 S. Ct. 2292 (1984) (citing *Lovasco*, 431 U.S. at 789-90; *Marion*, 404 U.S. at 324). *See also United States v. Lebron-Gonzalez*, 816 F.2d 823, 831 (1st Cir.), *cert. denied*, 484 U.S. 843 (1987); *United States v. Cornielle*, 171 F.3d 748, 752 (2d Cir. 1999); *United States v. Ismaili*, 828 F.2d 153, 166-68 (3d Cir. 1987), *cert. denied*, 485 U.S. 935, 99 L. Ed. 2d 271, 108 S. Ct. 1110 (1988); *United States v. Rogers*, 118 F.3d 466, 474-75 (6th Cir. 1997); *United States v. Stierwalt*, 16 F.3d 282, 285 (8th Cir. 1994); *United States v. Hayes*, 40 F.3d 362, 365 (11th Cir. 1994), *cert. denied*, 516 U.S. 812, 133 L. Ed. 2d 24, 116 S. Ct. 62 (1995). The defendant bears the burden of proving both actual prejudice and improper purpose. *Cornielle*, 171 F.3d at 752; accord *Ismaili* 828 F.2d at 167; *Amuny*, 767 F.2d at 1119; *Hayes*, 40 F.3d at 365.

In the present case, we hold that Morrisette failed to establish that the Commonwealth intentionally delayed arresting or indicting him in order to gain a tactical advantage. Morrisette concedes that there is no direct evidence to prove this element of the two-part test. Nevertheless, he argues that an improper motive can be inferred from the fact that the requested comparison testing of White's and Morrisette's respective PERK samples was not completed in 1985 and because of the police department's "willful failure" to verify the statement Morrisette gave a few days after White's murder. We do not agree. The evidence demonstrates that the police investigated several possible suspects and that the focus of the investigation simply shifted to persons other than Morrisette. Thus, the trial court did not err in denying Morrisette's motion to dismiss the indictments because of the pre-indictment delay. Morrisette's due process rights under the Constitution of the United States and the Constitution of Virginia were not violated by the delay. *See Willis v. Mullett*, 263 Va. 653, 657, 561 S.E.2d 705, 708 (2002) (due process protections afforded under the Constitution of Virginia are co-extensive with those of the federal constitution).

2. JURY SELECTION

Morrisette challenges the trial court's rulings with regard to two jurors. He claims that the court erred by striking juror Cooper for cause and by failing to excuse juror Johnson for cause. We find no merit in either of these assignments of error.

First, as to juror Cooper, the trial court excused her because she indicated that she could not consider imposing the death penalty under any circumstances. The following

excerpt from the voir dire of this juror illustrates her position regarding the death penalty:

> [COMMONWEALTH'S ATTORNEY]: Miss Cooper, I asked you a couple of minutes ago if you were selected as the foreman of the jury and the jury found the Defendant guilty of capital murder, um, would you be able to sign your name to a verdict form setting forth the jury sentence if that verdict was a death sentence, and you indicated that you had some difficulty with that.
>
> JUROR COOPER: Yes, I did.
>
> [COMMONWEALTH'S ATTORNEY]: Do you have difficulty with imposing the imposition of the death penalty? Is that something difficult for you?
>
> JUROR COOPER: Yes.
>
> [COMMONWEALTH'S ATTORNEY]: Okay. Is it something that you would have a hard time considering in this or –
>
> JUROR COOPER: Yes.
>
> [COMMONWEALTH'S ATTORNEY]: – any other case?
>
> JUROR COOPER: Yes.
>
> [COMMONWEALTH'S ATTORNEY]: All right. Thank you.
>
> [DEFENSE COUNSEL]: Miss Cooper, if you were on the jury and the Judge advised you to consider all the evidence in the case that includes guilt or innocence and also includes as a possible punishment . . . the death penalty, even though you would have some hesitancy, could you

> still fairly consider that in arriving at your verdict in this case?
>
> JUROR COOPER: No, I don't think I would be able to.
>
> [DEFENSE COUNSEL]: Not under any circumstance as to the death penalty?
>
> JUROR COOPER: I feel like I could not. I would not be able to.
>
> [DEFENSE COUNSEL]: Okay. Thank you, your Honor.

Regarding juror Johnson, Morrisette moved to excuse this juror because, on the morning of trial, Johnson had read a newspaper article containing information about White's murder and Morrisette's prior conviction for maiming. Juror Johnson also had some independent recollection of the occurrence of White's murder. When asked if his memory coupled with the newspaper article had "put facts in [his] mind that would stay with [him] through the course of this trial[,]" juror Johnson responded:

> That would be a little hard to answer, sir. Of course, it would, you know, my memories and reading the paper, but I think that I would listen to the witnesses and just disregard what I've seen or heard up to this point . . . and just listen to the witnesses. I think so.

The trial court denied Morrisette's motion to excuse Johnson, concluding that Johnson was simply being honest in his response and that he could listen to the evidence with an open mind.

Upon appellate review, we give deference to a trial court's determination regarding whether to excuse or retain a prospective juror "because the trial judge has observed and heard each member of the venire and is in a superior position to evaluate whether the juror's responses during voir dire develop anything that would prevent or substantially impair the juror's performance of duty as a juror in accord with the court's instructions and the juror's oath." *Vinson v. Commonwealth*, 258 Va. 459, 467, 522 S.E.2d 170, 176 (1999), *cert. denied*, 530 U.S. 1218, 147 L. Ed. 2d 257, 120 S. Ct. 2226 (2000). In doing so, we consider a juror's entire voir dire, not just isolated parts. *Mackall v. Commonwealth*, 236 Va. 240, 252, 372 S.E.2d 759, 767 (1988), *cert. denied*, 492 U.S. 925, 106 L. Ed. 2d 607, 109 S. Ct. 3261 (1989). Absent a showing of manifest error, we will affirm a trial court's decision to exclude or retain a juror. *Vinson*, 258 Va. at 467, 522 S.E.2d at 176.

We do not find manifest error in the trial court's decisions regarding jurors Cooper and Johnson. Cooper stated unequivocally, in response to a question by Morrisette's counsel, that she would not be able to consider imposing the death penalty under any circumstances. Johnson stated that the newspaper article he read on the morning of trial would not affect his judgment, that he could remain impartial, and that he could base his decision solely on the evidence presented in the courtroom, disregarding anything that he had seen or heard previously. Thus, we conclude that the trial court did not abuse its discretion in excluding juror Cooper and retaining juror Johnson.

3. SUFFICIENCY OF EVIDENCE OF RAPE

At the conclusion of the Commonwealth's evidence in the guilt phase of the trial, Morrisette moved to strike that evidence as to the charge of rape and, thus, also as the underlying predicate for the capital murder charge. Morrisette claimed, as he does on appeal, that the Commonwealth failed to prove nonconsensual intercourse by the use of force.[6]

Morrisette points to Dr. Presswalla's testimony at trial that there were no injuries in White's genital area and seeks to disconnect the rape from the murder by relying on Dr. Presswalla's testimony that intact sperm inside the vagina can be identified for up to 26 hours after a sexual act. He also relies on the fact that other people had access to White's residence, including her "boyfriend," Albert Anthony, who had called White's co-workers and asked them to check on White when she did not come to work on the morning that her body was eventually discovered.

Viewing the evidence in the light most favorable to the Commonwealth, the trial court denied the motion, finding that the question whether White had been raped was a jury issue. We agree and conclude that the trial court did not err in refusing to strike the Commonwealth's evidence of rape.

In contrast to the testimony emphasized by Morrisette, Dr. Presswalla stated that the absence of genital injury is not unusual in a sexual assault case when a

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[6] In 1980, when the offense was committed, the provisions of Code § 18.2-61 required proof that the sexual intercourse occurred against the victim's will and through the use of force. The use of threat or intimidation is included in the present version of Code § 18.2-61.

weapon is involved. He further explained that, in this case, semen was also recovered from the vulva, and he opined that it was most unlikely that semen would have remained on the surface of the victim's external genitals for several hours unless she had been incapacitated during that time. Dr. Presswalla also testified that the knife wounds were sustained not long after the semen was deposited. Those multiple knife wounds included the slashing of White's throat and several defensive wounds sustained while she was trying to ward off her attacker. Furthermore, her clothes were in disarray, with most of her body nude. These facts are sufficient to support the defendant's conviction for rape and the use of that conviction as the predicate offense for the capital murder conviction. *See Johnson v. Commonwealth*, 259 Va. 654, 682, 529 S.E.2d 769, 785 (15 stab wounds and other injuries demonstrated that victim did not consent to sexual intercourse), *cert. denied*, 531 U.S. 981, 148 L. Ed. 2d 439, 121 S. Ct. 432 (2000).

B. ISSUES PREVIOUSLY DECIDED

On appeal, Morrisette raises several issues that this Court has already decided adversely to the position he espouses. In fact, Morrisette's counsel acknowledged during oral argument that all the following issues have been resolved by this Court, but asked, nevertheless, that we reconsider our prior decisions. However, we find no reason to depart from our precedent. Thus, we reaffirm our prior holdings and reject the following arguments:

1. Imposition of the death penalty violates the Eighth Amendment's prohibition against cruel and unusual punishment. Rejected in *Johnson*, 259 Va. at 667,

529 S.E.2d at 776; *Jackson v. Commonwealth*, 255 Va. at 635, 499 S.E.2d at 545; *Goins v. Commonwealth*, 251 Va. 442, 453, 470 S.E.2d 114, 122, *cert. denied*, 519 U.S. 887, 136 L. Ed. 2d 154, 117 S. Ct. 222 (1996); *Spencer v. Commonwealth*, 238 Va. 563, 568-69, 385 S.E.2d 850, 853 (1989), *cert. denied*, 493 U.S. 1093, 107 L. Ed. 2d 1073, 110 S. Ct. 1171 (1990).

2. Virginia's two statutory aggravating factors, "vileness" and "future dangerousness," are unconstitutionally vague on their face and as applied and thus fail to guide the jury's exercise of discretion. Rejected in *Beck v. Commonwealth*, 253 Va. 373, 387, 484 S.E.2d 898, 907, *cert. denied*, 522 U.S. 1018 (1997); *Clagett v. Commonwealth*, 252 Va. 79, 86, 472 S.E.2d 263, 267 (1996), *cert. denied*, 519 U.S. 1122, 136 L. Ed. 2d 856, 117 S. Ct. 972 (1997); *Williams v. Commonwealth*, 248 Va. 528, 535-36, 450 S.E.2d 365, 371 (1994), *cert. denied*, 515 U.S. 1161, 132 L. Ed. 2d 858, 115 S. Ct. 2616 (1995); *Breard v. Commonwealth*, 248 Va. 68, 74-75, 445 S.E.2d 670, 675, *cert. denied*, 513 U.S. 971, 130 L. Ed. 2d 353, 115 S. Ct. 442 (1994).

3. Use of the defendant's prior convictions to establish "future dangerousness" and to impose the death penalty violates the constitutional protection against double jeopardy. Rejected in *Joseph v. Commonwealth*, 249 Va. 78, 82, 452 S.E.2d 862, 865, *cert. denied*, 516 U.S. 876, (1995); *Yeatts v. Commonwealth*, 242 Va. 121, 126, 410 S.E.2d 254, 258 (1991), *cert. denied*, 503 U.S. 946, 117 L. Ed. 2d 639, 112 S. Ct. 1500 (1992); *Watkins v. Commonwealth*, 238 Va. 341, 352, 385 S.E.2d 50, 56 (1989), *cert. denied*, 494 U.S. 1074, 108 L. Ed. 2d 798, 110 S. Ct. 1797 (1990).

4. Virginia's jury instructions regarding mitigating evidence do not provide meaningful guidance to the jury because the instructions do not inform the jurors that they have a duty to consider mitigating evidence, do not provide any standard of proof regarding mitigating evidence, do not state that the death penalty can be imposed only if the jury is convinced beyond a reasonable doubt that aggravating factors outweigh mitigating ones, do not advise jurors that they are free to give mitigating evidence the weight and effect that each juror believes is appropriate, do not list the statutory examples of mitigating evidence, and do not define the terms "fairness" and "mercy."[7] Rejected in *Buchanan v. Angelone*, 522 U.S. 269, 275-77, 139 L. Ed. 2d 702, 118 S. Ct. 757 (1998); *Cherrix v. Commonwealth*, 257 Va. 292, 299, 513 S.E.2d 642, 647, *cert. denied*, 528 U.S. 873, 145 L Ed. 2d 149, 120 S. Ct. 177 (1999); *Breard*, 248 Va. at 74, 445 S.E.2d at 674-75; *Swann v. Commonwealth*, 247 Va. 222, 228, 441 S.E.2d 195, 200, *cert. denied*, 513 U.S. 889, 130 L. Ed. 2d 158, 115 S. Ct. 234 (1994); *Satcher v. Commonwealth*, 244 Va. 220, 228, 421 S.E.2d 821, 826 (1992), *cert. denied*, 507 U.S. 933, 122 L. Ed. 2d 705, 113 S. Ct. 1319 (1993); *Watkins v. Commonwealth*, 229 Va. 469, 490-91, 331 S.E.2d 422, 438 (1985), *cert. denied*, 475 U.S. 1099, 89 L. Ed. 2d 903, 106 S. Ct. 1503 (1986).

5. Virginia does not provide meaningful appellate review in death penalty cases because of the expedited

[7] We note that the instructions given to the jury during the penalty phase of the trial provided that the jury "shall consider any mitigation evidence," that "a mitigating factor is one that would tend to favor a sentence of . . . imprisonment for life," and that such evidence does not have to be proven beyond a reasonable doubt.

review procedure and because this Court does not consider all capital murder cases, including those not appealed to the Court, in conducting its proportionality review. Rejected in *Emmett v. Commonwealth*, No. 020314, 264 Va. ___, ___, ___ S.E.2d ___, ___, 2002 Va LEXIS 102 (2002) (this day decided); *Lovitt v. Commonwealth*, 260 Va. 497, 509, 537 S.E.2d 866, 874 (2000), *cert. denied*, 151 L. Ed. 2d 14, ___ U.S. ___, 122 S. Ct. 41 (2001); *Bailey v. Commonwealth*, 259 Va. 723, 740-42, 529 S.E.2d 570, 580-81, *cert. denied*, 531 U.S. 995, 148 L. Ed. 2d 460, 121 S. Ct. 488 (2000); *Goins*, 251 Va. at 453, 470 S.E.2d at 122.

6. Morrisette was entitled to expanded discovery beyond the scope of Rule 3A:11. Rejected in *Walker v. Commonwealth*, 258 Va. 54, 63, 515 S.E.2d 565, 570-71 (1999), *cert. denied*, 528 U.S. 1125, 145 L. Ed. 2d 829, 120 S. Ct. 955 (2000); *Strickler v. Commonwealth*, 241 Va. 482, 490-91, 404 S.E.2d 227, 233, *cert. denied*, 502 U.S. 944, 116 L. Ed. 2d 337, 112 S. Ct. 386 (1991).

C. STATUTORY REVIEW

Pursuant to the provisions of Code § 17.1-313(C)(1), this Court is required to consider and determine whether the death sentence in this case was imposed under the influence of passion, prejudice, or other arbitrary factors. Morrisette does not point to any such factor, and our review of the record does not reveal any evidence to suggest that Morrisette's sentence of death was based on or influenced by any passion, prejudice, or other arbitrary factors.

We are also required to consider and decide whether Morrisette's sentence of death is "excessive or disproportionate to the penalty imposed in similar cases, considering both

the crime and the defendant." Code § 17.1-313(C)(2). "The purpose of our comparative review is to reach a reasoned judgment regarding what cases justify the imposition of the death penalty." *Orbe v. Commonwealth*, 258 Va. 390, 405, 519 S.E.2d 808, 817 (1999), *cert. denied*, 529 U.S. 1113, 146 L. Ed. 2d 800, 120 S. Ct. 1970 (2000). In conducting this statutorily mandated review in this case, we have focused on cases in which the victim was murdered during the commission of rape, and in which the sentence of death was imposed based on findings of both "future dangerousness" and "vileness." *See, e.g., Swisher v. Commonwealth*, 256 Va. 471, 506 S.E.2d 763 (1998), *cert. denied*, 528 U.S. 812, 145 L. Ed. 2d 41, 120 S. Ct. 46 (1999); *Cherrix*, 257 Va. 292, 513 S.E.2d 642; *Pruett v. Commonwealth*, 232 Va. 266, 351 S.E.2d 1 (1986), *cert. denied*, 482 U.S. 931, 96 L. Ed. 2d 706, 107 S. Ct. 3220 (1987); *Coleman v. Commonwealth*, 226 Va. 31, 307 S.E.2d 864 (1983), *cert. denied*, 465 U.S. 1109, 80 L. Ed. 2d 145, 104 S. Ct. 1617 (1984); *Mason v. Commonwealth*, 219 Va. 1091, 254 S.E.2d 116, *cert. denied*, 444 U.S. 919, 62 L. Ed. 2d 176, 100 S. Ct. 239 (1979); *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978), *cert. denied*, 441 U.S. 967 (1979). We have also considered cases in which defendants received life sentences, rather than the death penalty, for capital murder during the commission of rape. *See, e.g., Horne v. Commonwealth*, 230 Va. 512, 339 S.E.2d 186 (1986); *Keil v. Commonwealth*, 222 Va. 99, 278 S.E.2d 826 (1981).

Morrisette does not argue that his sentence of death is excessive or disproportionate to the penalty generally imposed in comparable cases. Based on our independent review of this case and similar cases, we conclude that Morrisette's sentence of death is not excessive or disproportionate to sentences generally imposed in this Commonwealth for capital murders comparable to the defendant's murder of Dorothy White.

III. CONCLUSION

For the reasons stated, we find no error in the judgments of the circuit court or in the imposition of the death penalty. We also perceive no reason to commute the sentence of death in this case. Thus, we will affirm the judgments of the circuit court.[8]

Affirmed.

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[8] Morrisette failed to brief the following assignments of error. Thus, we will not consider them on appeal. *Bell v. Commonwealth*, 264 Va. 172, 183, 563 S.E.2d 695, ___ (2002); *Kasi v. Commonwealth*, 256 Va. 407, 413, 508 S.E.2d 57, 60 (1998), *cert. denied*, 527 U.S. 1038, 144 L.Ed.2d 798, 119 S. Ct. 2399 (1999).

No. 9: that portion of this assignment of error alleging that Code § 19.2-264.3:1(D)-(F) "is in conflict with the rights of the defendant under the Compulsory Process Clause . . . and his right against self-incrimination;"

No. 12: the trial court erred in failing to strike prospective juror Wright;

No. 18: the trial court "erred in overruling an objection to [the introduction of] pictures from trial without foundation;" and

No. 20: the trial court erred in denying a motion to defer sentencing until the United States Supreme Court decides an issue regarding whether a mentally retarded defendant can be sentenced to death. However, the record in this case would not support a finding of mental retardation. *But see Atkins v. Virginia*, 153 L.Ed.2d 335, ___ U.S. ___, 122 S. Ct. 2242 (2002). Intelligence tests were administered to Morrisette on two occasions, with resulting I.Q. scores of 77 and 82. A psychiatrist who evaluated Morrisette with regard to the present charges opined that Morrisette's "intelligence appeared roughly below average." Although Morrisette withdrew from school in the eighth grade with failing grades, he obtained a general equivalency diploma while serving in the military.

Virginia Code § 19.2-264.4 Sentence proceeding. – A. Upon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment. Upon request of the defendant, a jury shall be instructed that for all Class 1 felony offenses committed after January 1, 1995, a defendant shall not be eligible for parole if sentenced to imprisonment for life. In case of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life.

A1. In any proceeding conducted pursuant to this section, the court shall permit the victim, as defined in § 19.2-11.01, upon the motion of the attorney for the Commonwealth, and with the consent of the victim, to testify in the presence of the accused regarding the impact of the offense upon the victim. The court shall limit the victim's testimony to the factors set forth in clauses (i) through (vi) of subsection A of § 19.2-299.1.

B. In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence, except that reports under the provisions of § 19.2-299, or under any rule of court, shall not be admitted into evidence.

Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) the defendant has no significant history of prior criminal activity, (ii) the capital felony was committed while the defendant was

under the influence of extreme mental or emotional disturbance, (iii) the victim was a participant in the defendant's conduct or consented to the act, (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired, (v) the age of the defendant at the time of the commission of the capital offense, or (vi) mental retardation of the defendant.

C. The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

D. The verdict of the jury shall be in writing, and in one of the following forms:

(1) "We, the jury on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mine) (aggravated battery to the victim), and having

considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Signed _____, foreman"

or

(2) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

Signed _____, foreman"

E. In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life. (1977, c. 492; 1980, c. 160; 1990, cc. 316, 754; 1998, c. 485; 2000, c. 838.)

INSTRUCTION NO. 6

If you find that the Commonwealth has proved beyond a reasonable doubt the existence of an aggravating circumstance, in determining the appropriate punishment you shall consider any mitigation evidence presented of circumstances which do not justify or excuse the offense but which in fairness or mercy may extenuate or reduce the degree of moral culpability and punishment.